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In The
Supreme Court of the United States

JOSEPH KLAUSER, Warden,

Petitioner,

v.

WILLIAM L. GRAY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent William Gray was convicted of two counts of first-degree murder for killing his wife, Betty Gray, and her friend, Reeda Roundy. The state trial court allowed the prosecution to introduce evidence of Betty Gray's hearsay statements to show Gray's motive. The trial court excluded, however, evidence of hearsay statements by Roundy that a former boyfriend had threatened and stalked her. The Ninth Circuit determined that the prosecution's and the defendant's hearsay evidence were "of similar import and character," and therefore the trial court had applied Idaho's hearsay rules in "an arbitrary or uneven way." The Ninth Circuit held that this violated Gray's constitutional right to present evidence in his defense. The Ninth Circuit further held that a defendant is entitled to present evidence that a third party may have committed the crime "even if the defense theory is purely speculative." The questions presented are:

1. Is a comparison of different evidentiary rulings by a state court, to determine whether state evidentiary rules have been applied in "an arbitrary or uneven way," effectively a review for evidentiary error and, therefore, beyond the scope of federal habeas corpus jurisdiction?

2. May a state trial court, consistent with a criminal defendant's constitutional right to present evidence, exclude speculative and untrustworthy hearsay evidence of a third party's guilt?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Attorney General for the State of Idaho, on behalf of Joseph Klauser, Warden, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1-60) is found at 282 F.3d 633.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2002. A petition for rehearing was denied on April 22, 2002 (App., *infra*, 84). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides, in relevant part, that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law."

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, "nor shall any state

deprive any person of life, liberty or property, without due process of law."

The Compulsory Process Clause of the Sixth Amendment provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

Federal habeas corpus law provides, in relevant part, that "[t]he writ of habeas corpus shall not extend to a prisoner unless – . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ." 28 U.S.C. § 2241(c) (1994).

STATEMENT OF THE CASE

William L. Gray was convicted in the Idaho courts on two counts of first degree murder and one count of burglary for killing his wife, Betty Gray, and her friend, Reeda Roundy. App., *infra*, 86. The trial court allowed the prosecution, under Idaho's residual hearsay exception (I.R.E. 803(24)), to admit evidence of Betty Gray's hearsay statements regarding the Gray's pending divorce, Gray's efforts to keep the impending divorce secret, and Gray's knowledge she was having an affair, to establish Gray's motive. *Id.* at 88-91. The trial court excluded, as not falling within any hearsay exception, evidence of hearsay statements by Reeda Roundy that a former boyfriend, J. W. Dyer, was a mercenary, that he had followed her around and repeatedly telephoned her, and that he had threatened to kill her, which Gray offered to show that Dyer was an alternative suspect. *Id.* at 95-98.

The Idaho Court of Appeals affirmed Gray's convictions. The court held that the district court had not abused its discretion in finding circumstantial guarantees of trustworthiness in relation to the Betty Gray hearsay, which finding was supported by the record. *Id.* at 91. In relation to the Reeda Roundy hearsay statements, the court did not adopt the reasoning of the district court regarding application of the residual hearsay exception, but held that the record showed no error because Gray's offer of proof did not include the circumstances surrounding the declarations, and therefore the record did not support Gray's appellate claim that the district court abused its discretion. *Id.* at 95-98.

Gray sought habeas corpus relief contending, in part, that the State of Idaho had violated his constitutional rights to present evidence in his defense when it excluded the evidence of Roundy's hearsay statements. The federal district court granted the state's motion for summary judgment. *Id.* at 61-83.

On appeal, the Ninth Circuit stated that, under the due process clauses of the Fifth and Fourteenth Amendments and compulsory process clause of the Sixth Amendment, a state may not arbitrarily prevent a defendant from presenting evidence and "may not without justification impose stricter evidentiary standards on a defendant . . . than it does on the prosecution." *Id.* at 20. The court then compared the trial court's analysis in allowing the prosecution to introduce the Betty Gray hearsay evidence with its analysis in excluding the evidence of Reeda Roundy's hearsay statements. The court concluded that "the trial court indubitably applied Idaho's residual hearsay exception arbitrarily and unevenly" because it, without explanation, "used two completely

different analytical frameworks" in making the two rulings. *Id.* at 24.

The court determined that the trial court's analysis had "diverged in at least three significant ways." *Id.* at 24. First, the trial court had specifically determined that the facts contained in the Betty Gray hearsay were material to the case, but, because it did not consider the facts of the Reeda Roundy hearsay statements separate from the state of mind facts, the "external fact statements [by Roundy] were rejected summarily for lack of materiality, with no pertinent analysis or explanation." *Id.* at 24-25. Second, the court determined that in reviewing the prosecution's hearsay evidence the trial court engaged in a separate analysis between Idaho's state of mind hearsay exception of Rule 803(3) of the Idaho Rules of Evidence, but concluded that because Roundy's state of mind was irrelevant, so too were the facts underlying her fear. The trial court therefore gave inadmissibility under Rule 803(3) preclusive effect to Gray's hearsay evidence under Rule 803(24), but not to the state's. App., *infra*, 25-26. Third, the trial court specifically stated that the interests of justice are served by giving the jury as much information as possible when it admitted the prosecution's hearsay evidence but did not so state when it excluded the defense's. *Id.* at 26-27. These three differences in the trial court's analysis of the prosecution's hearsay evidence and the defense's hearsay evidence, which the Ninth Circuit considered "parallel" and of "similar import and character," showed an "asymmetrical application of evidentiary standards" that the court found unconstitutional. *Id.* at 13.

The Ninth Circuit then held that the trial court's exclusion of the defense evidence under the asymmetrical application of evidentiary rules was "without justification"

because evidence of another person's motive is "critical exculpatory evidence" that is admissible "[e]ven if the defense theory is purely speculative." *Id.* at 28-29. The Ninth Circuit also finally held that the state had failed to justify its exclusion by affirmatively showing that the defense hearsay evidence was not trustworthy. *Id.* at 29-33.

Judge Trott dissented, stating that the decision of the Idaho Court of Appeals that the Roundy hearsay evidence lacked guarantees of trustworthiness was binding on the federal courts exercising habeas jurisdiction, and therefore there was no arbitrary exclusion of it. *Id.* at 45-49. He characterized the majority's constitutional analysis as "legerdemain" to avoid restrictions on federal habeas jurisdiction. *Id.* at 59-60. Furthermore, exclusion of the evidence was harmless, as it had little, if any, probative value because Gray's alternative suspect, Dyer, had been eliminated by the police investigation that found that he had been in another state at the time of the killings. Therefore, the theory that Dyer was the killer was "rank speculation." *Id.* at 49-58.

REASONS FOR GRANTING THE PETITION

In this habeas corpus proceeding, the Ninth Circuit has adopted a constitutional standard, not supported by this Court's precedents and in conflict with the rulings of other circuits, that will have the effect of significantly interfering with state criminal trial process in two ways. First, the Ninth Circuit held that a defendant's constitutional right to present evidence is violated whenever a trial court imposes, without justification, a higher evidentiary

burden on the defendant for admission of evidence "of similar import and character" to that admitted for the prosecution. This standard is a significant expansion of constitutional analysis of a defendant's right to present evidence that is not supported by this Court's decisions. This expansion of constitutional analysis brings virtually all evidentiary rulings by state courts that exclude evidence offered by a criminal defendant under the umbrella of constitutional scrutiny because it elevates the question of whether a trial court consistently applied evidentiary rules to constitutional significance. Such a constitutional standard therefore necessarily and significantly expands federal habeas corpus jurisdiction, which does not include review of state-law error. Intervention by this Court to prevent such an expansion of federal habeas corpus review of state-law questions is thus needed.

Second, the Ninth Circuit also held that, at least where the prosecution has relied upon hearsay evidence of a defendant's motive, the defendant is constitutionally entitled to present hearsay evidence that another person had motive, even if the theory that the other person committed the crime is entirely speculative. Many jurisdictions, including every state in the Ninth Circuit and at least two other circuits, allow for the exclusion of evidence that another person has a motive unless the defendant offering such evidence can show some connection of that person to the crime, or at least opportunity to commit the crime. Such a higher evidentiary standard imposed upon a defendant has been upheld against constitutional claims in four other circuits. The Ninth Circuit's ruling is thus contrary to rulings in four other circuits, makes unconstitutional the state standards for admission of such evidence in every state in the Ninth Circuit, and calls into question

the evidentiary standards applicable in many other jurisdictions. Review by this Court is thus warranted.

A. The Constitutional Standard Adopted By The Ninth Circuit Expands Federal Habeas Corpus Jurisdiction In Contravention Of This Court's Decisions

This case presents an important federal question regarding the scope of federal habeas corpus jurisdiction. The Ninth Circuit held that a defendant's constitutional right to present evidence includes the consistent application of state-law rules of evidence. Such a constitutional standard brings within its scope virtually all rulings excluding defense evidence. Because federal habeas corpus grants jurisdiction over only constitutional questions and not state-law evidentiary rulings, the Ninth Circuit's constitutional analysis significantly expands federal habeas corpus jurisdiction. This Court should grant certiorari to determine if such an expanded standard of review is within the habeas jurisdiction of the federal courts.

1. The Ninth Circuit's holding that a criminal defendant is constitutionally entitled to consistent evidentiary rulings is a significant expansion of the scope of constitutional review. The Ninth Circuit held that precedent of this Court "clearly established" that an evidentiary ruling made by a trial court "may not without justification impose stricter evidentiary standards on a defendant desiring to present a witness' testimony than it does on the prosecution." App., *infra*, 20. This Court's precedents do not support such a rule of law, however. To the contrary, the Ninth Circuit has created a broad, new rule of constitutional due process review.

This Court has held that a state evidentiary rule does not violate a criminal defendant's right to present evidence unless the rule is arbitrary or disproportionate to the purposes the rule is designed to serve, and that a rule is not constitutionally arbitrary or disproportionate unless it infringes upon a weighty interest of the accused. *See United States v. Scheffer*, 523 U.S. 303, 308 (1998) (and cases cited). This Court has thus consistently applied a comparison of the weight of the defendant's interests in the admission of certain evidence against the government's interest in excluding it. Contrary to the Ninth Circuit's analysis, this Court has never engaged in a comparison of how a trial court has applied evidentiary rules to the prosecution's evidence as compared to the defendant's evidence to determine the scope of a defendant's right to present evidence.

For example, in *Washington v. Texas*, 388 U.S. 14 (1967), this Court held unconstitutional a rule barring accomplice testimony on behalf of a defendant. In *Green v. Georgia*, 442 U.S. 95 (1979), this Court held that preventing Green from presenting reliable hearsay evidence mitigating his guilt at his sentencing hearing violated his rights. In both these cases this Court referred to, in support of its conclusion that the defendant's evidence had been arbitrarily excluded, the fact that *the same* evidence or class of evidence was deemed sufficiently reliable to be admitted when offered by the prosecution. *Washington*, 388 U.S. at 22-23; *Green*, 442 U.S. at 97. In neither of these cases, however, did this Court make the defendant's constitutional right to present evidence contingent upon the prosecution's ability to have similar evidence admitted. For example, Texas could not have properly barred defendants from introducing accomplice testimony by merely

making all such testimony inadmissible by either party; nor would Green have been any less entitled to the introduction of his co-defendant's confession if that same evidence had been unavailable to the prosecution in his co-defendant's trial.

Nor do the other cases cited by the Ninth Circuit ultimately support its comparative analysis of state evidentiary rulings. For example, in *Webb v. Texas*, 409 U.S. 95 (1972), this Court held that the trial judge's "threatening remarks," that the witness would be convicted of perjury if he testified, "effectively drove" the defendant's only witness off the stand. *Webb*, 409 U.S. at 98. Even though this Court referenced the fact that the trial judge had singled out the defendant's witness for this conduct, this was not the basis for this Court's holding – treating all witnesses to such a diatribe clearly would not have cured the constitutional defect. The Ninth Circuit's reliance upon *Chambers v. Mississippi*, 410 U.S. 284 (1973) (rule preventing impeachment of own witness deprived defendant of fair trial), and *Cool v. United States*, 409 U.S. 100 (1972) (instruction that required jury to ignore defense evidence unless jury found it true beyond a reasonable doubt was reversible error), is likewise misplaced, as this Court nowhere indicated in these opinions that determination of a defendant's right to present evidence is somehow directly linked to the prosecution's ability to present similar evidence.

Whether the prosecution could admit the similar evidence was not salient in these cases – this Court determined whether the evidence excluded, on its own merit, was sufficiently reliable that its exclusion served no useful purpose and was therefore arbitrary. Under the Ninth Circuit's analysis of whether the trial court's rulings

were "asymmetrical," however, it appears that Gray would have had no constitutional right to present his hearsay evidence if the state court had also found the state's "similar" hearsay evidence inadmissible. The Ninth Circuit has thus shifted the constitutional analysis from whether Gray had an absolute constitutional right to present the hearsay evidence in question to whether a comparison of state court rulings on state-law questions shows that the state court reached "irreconcilable results." App., *infra*, 27. Such an analysis greatly expands constitutional standards.

2. The expansion of constitutional standards to include review of the consistency of evidentiary rulings necessarily expands the scope of federal habeas corpus jurisdiction. This Court has repeatedly stated that "'federal habeas corpus relief does not lie for errors of state law.'" *Estelle v. McGuire*, 502 U.S. 62, 67 (1991), *quoting Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). Thus, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *McGuire*, 502 U.S. at 67-68. The Ninth Circuit's elevation of "an arbitrary or uneven" application of evidentiary standards to constitutional significance, however, brings virtually any claim that the state court erroneously excluded defense evidence within the scope of federal habeas review. It is difficult to imagine that a criminal defendant who can demonstrate that a state court's ruling excluding evidence he offered was erroneous under state-law standards has not also demonstrated that the ruling was "arbitrary or uneven," and therefore established a *prima facie* claim of constitutional error under the Ninth Circuit's standards.

Nor is a defendant limited to showing error in the exclusion of his offered evidence to show a constitutional

violation under the Ninth Circuit's standard. The Ninth Circuit specifically stated that had the state trial court "applied the reasoning used to exclude Roundy's statements to Betty Gray's statements, it would have excluded those statements as well." *Id.* at 13. Thus, under the Ninth Circuit's constitutional analysis, erroneous admission of evidence offered by the state also amounts to a constitutional violation, at least in cases where the defense has offered evidence that is "parallel" or "of similar import and character." *Id.* at 13. In other words, under the Ninth Circuit's standard a defendant may establish a constitutional violation of his right to present evidence – and thus bring his claim within federal habeas jurisdiction – if he can show that the trial court erroneously admitted evidence offered by the prosecution but did not also erroneously admit "evidence of similar import and character" by the defense.

The Ninth Circuit has adopted a constitutional standard that allows a habeas corpus petitioner to make a *prima facie* constitutional claim by showing that a state court's ruling either excluding defense evidence or admitting prosecution evidence is "arbitrary or uneven" when compared to other rulings. Such an expansive constitutional standard elevates to constitutional significance most state court evidentiary rulings, and thus, although not a direct review for state-law error, constitutes a substantial expansion of federal habeas corpus jurisdiction. Such a substantial expansion will have the effect of significantly interfering with the state criminal trial process and merits review by this Court.

B. By Holding That A Defendant Has A Constitutional Right To Present Speculative Evidence Of A Third Party's Guilt, The Ninth Circuit Has Brought Itself Into Conflict With The Decisions Of This Court, Numerous State Evidentiary Standards And State Supreme Court Decisions, And The Decisions Of Several Other Circuits

The Ninth Circuit has held that a defendant has a constitutional right to present evidence of a third party's motive to commit the crime even if the defense theory is speculative. This Court, however, has never extended a criminal defendant's right to present evidence to include speculative evidence. In addition, a majority of jurisdictions – including every state in the Ninth Circuit, three other circuits, and several other states – have evidentiary standards proscribing admission of evidence of a third party's motive without more. Such standards have been upheld against constitutional challenge in at least four other circuits. Review by this Court is warranted to resolve the numerous conflicts created by the Ninth Circuit's opinion.

1. The Ninth Circuit's extension of a defendant's constitutional right to present evidence to include evidence that is speculative is contrary to this Court's precedents. This Court has stated that the exclusion of evidence violates a defendant's right to present evidence "only where it has infringed upon a weighty interest of the accused." *See United States v. Scheffer*, 523 U.S. 303, 308 (1998). The Ninth Circuit determined that the Reeda Roundy hearsay evidence met this standard because it was "material to the defense." App., *infra*, 28-29. In making this determination, and responding to the dissent, the

Ninth Circuit relied upon its own evidentiary standard for the admission of evidence that another perpetrator committed the crime. *Id.* at 29. Under that standard, evidence that someone else may have committed the crime is "'*critical*,'" even if "'the defense theory is purely speculative.'" *Id.* at 29 (emphasis original), *quoting Thomas v. Hubbard*, 273 F.3d 1164, 1177 (9th Cir. 2001), *and United States v. Vellejo*, 237 F.3d 1008, 1023 (9th Cir.), *amended*, 246 F.3d 1150 (9th Cir. 2001). That standard cannot be reconciled with this Court's constitutional standard, and represents a significant expansion of federal constitutional law in this area.

2. The Ninth Circuit's holding that a defendant's right to present evidence of another's guilt extends even to evidence of speculative theories calls into question the constitutionality of evidentiary standards applicable in every state in the Ninth Circuit – all of which permit trial courts to exclude such evidence. In Alaska, rules of relevance and materiality provide that a defendant may "implicate a specific individual" only where the evidence that the individual committed the crime "'tend[s] to directly connect such other person with the actual commission of the crime charged.'" *Smithart v. State*, 988 P.2d 583, 586-87 (Alaska 1999) (brackets original) (also noting that "virtually every state" requires some similar preliminary showing before allowing introduction of such evidence), *quoting Marrone v. State*, 359 P.2d 969, 984-85 n.19 (Alaska 1961). Likewise, in Arizona, "The rule is that threats by a third person against a victim may not be shown unless coupled with other evidence having an inherent tendency to connect such other person with the actual commission of the crime." *State v. Soto-Fong*, 187 Ariz. 186, 199, 928 P.2d 610, 622 (1996), *cert. denied*, 520 U.S. 1231 (1997); *see also State v. Gibson*, 202 Ariz. 321, 44

P.3d 1001 (2002) (evidence of third party guilt subject to test of relevancy and balancing of probative value against potential for unfair prejudice, confusion, misleading the jury or delay).

California also deems that, to be admissible, evidence of a third party's guilt "must link the third person either directly or circumstantially to the actual perpetration of the crime" (and rejects the claim that such a standard violates constitutional principles of due process and a defendant's right to present a defense). *People v. Bradford*, 15 Cal.4th 1229, 1325, 939 P.2d 259, 313 (1997), *cert. denied,* 523 U.S. 1118 (1998); *see also People v. Cunningham*, 25 Cal.4th 926, 997, 25 P.3d 519, 566 (2001), *cert. denied,* ___ U.S. ___, 122 S.Ct. 1092 (2002) (proper to exclude evidence of third-party guilt where defendant did not develop "a theory of the murder related to [the victim's] purported involvement with such a third party"). Under Hawaii's relevancy standards "there must be some evidence linking the third person to the crime in order to admit evidence of the third person's motive." *State v. Rabellizsa*, 79 Hawai'i 347, 350-51, 903 P.2d 43, 46-47 (1995).

Although it preceded the adoption of Idaho's current rules of evidence, Idaho also has precedent that some showing of a third person's connection to the crime must be shown before evidence that that person may have committed the crime can be introduced, as a defendant is not entitled to "indulge in conjectural inferences" that the other person might have committed the crime. *State v. Larsen*, 91 Idaho 42, 47, 415 P.2d 685, 690 (1966). Evidence of another person's guilt, in the form of an overheard conversation, was found "too tenuous and remote" for admission in Montana. *State v. Rudolph*, 238 Mont.

135, 144, 777 P.2d 296, 302 (1989). Nevada also allows the exclusion of evidence that another person committed the crime where that evidence raises only "mere conjecture." *Dorsey v. State*, 96 Nev. 951, 954, 620 P.2d 1261, 1263 (1980). In Oregon speculative evidence of another person's potential guilt has been held to be properly excluded. *State v. Holterman*, 69 Or.App. 509, 515-16, 687 P.2d 1097, 1100-01 (1984), *review denied,* 298 Or. 172, 691 P.2d 481 (1984). Finally, in Washington, "[e]vidence connecting another person with the crime charged is not admissible unless there is a train of facts or circumstances which tend clearly to point to someone other than the defendant as the guilty party." *State v. Stenson*, 132 Wash.2d 668, 733, 940 P.2d 1239, 1272 (1997), *cert. denied,* 523 U.S. 1008 (1998), *citing State v. Maupin*, 128 Wash.2d 918, 927-28, 913 P.2d 808 (1996) (motive alone or in combination with threats inadmissible unless coupled with evidence tending to connect third person with crime).

As the above cited cases show, speculative evidence of a third person's guilt is excludable under the evidentiary standards of every state in the Ninth Circuit. Under the constitutional standard adopted by the Ninth Circuit in this case, the evidentiary standards of each such state are unconstitutional, at worst, and, at best, every ruling in any court of these states excluding a criminal defendant's evidence of another's guilt is subject to federal habeas corpus review. The potential burden this places upon the states and their criminal justice systems is enormous, and merits review by this Court.

3. The Ninth Circuit's constitutional standard is also directly contrary to the evidentiary standards of at least two other circuits and many other states. The First and Eighth Circuits have specifically held that evidence of a

third person's guilt must be more than "mere speculation" to be relevant. *See United States v. Patrick*, 248 F.3d 11, 21 (1st Cir.), *cert. denied*, ___ U.S. ___, 122 S.Ct. 620 (2001); *United States v. DeNoyer*, 811 F.2d 436, 440 (8th Cir. 1987). In addition, several states outside of the Ninth Circuit require a defendant to demonstrate some evidence of a connection between the alternative perpetrator and the crime before evidence of that third person's guilt is admissible. *People v. Schwartz*, 678 P.2d 1000, 1008-09 (Colo. 1984); *State v. Hernandez*, 224 Conn. 196, 202, 618 A.2d 494, 497 (1992); *Resper v. United States*, 793 A.2d 450, 459-61 (D.C.App. 2002); *Allen v. State*, 275 Ga. 64, 68, 561 S.E.2d 397, 401 (2002); *Commonwealth v. Rise*, 50 Mass.App.Ct. 836, 844, 744 N.E.2d 66, 73, *review denied*, 434 Mass. 1102, 751 N.E.2d 419 (2001); *Woodruff v. State*, 608 N.W.2d 881, 885 (Minn. 2000); *Helmig v. State*, 42 S.W.3d 658, 671-72 (Mo. App., Div. 2, 2001); *Spence v. State*, 795 S.W.2d 743, 754-55 (Tx. Cr. App. 1990), *cert. denied*, 499 U.S. 932 (1991); *State v. Griswold*, 782 A.2d 1144, 1146-47 (Vt. 2001); *State v. Parr*, 207 W.Va. 469, 475, 534 S.E.2d 23, 29 (2000).[1]

By holding that a defendant has a constitutional right to present speculative evidence of a third-party's culpability, the Ninth Circuit has, in effect, declared unconstitutional

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[1] *See also* McCord, *"But Perry Mason Made it Look So Easy!"*: The *Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty*, 63 Tenn. L. Rev. 917, 937-38 (1996) (majority of jurisdictions that have clear case-law on subject require, at least in part, evidence directly connecting alternative perpetrator to the crime); 40A Am.Jur.2d, *Homicide* § 286 (Supp. 2002) (citing cases from many jurisdictions that require more than mere speculation before a defendant can introduce evidence of another person's guilt).

the evidentiary standards applicable in virtually all courts except the Ninth Circuit. A constitutional standard so at odds with the rules of evidence as interpreted in so many jurisdictions deserves review by this Court.

4. The Ninth Circuit's holding in this case also conflicts with decisions by the First, Tenth, Eleventh and District of Columbia Circuits holding that the Constitution was not implicated by the exclusion of evidence of a third party's guilt. For example, in *Matthews v. Price*, 83 F.3d 328 (10th Cir. 1996), Matthews sought habeas corpus relief from his Colorado convictions for sexual assault upon his two children, claiming, in part, that the trial court had improperly excluded hearsay evidence that Matthews' son was the actual perpetrator. The Tenth Circuit quickly dispensed with claims that exclusion was in violation of Colorado's rules of evidence on the grounds that such were not within the court's habeas jurisdiction. *Matthews*, 83 F.3d at 331. In addressing Matthews' argument of constitutional error in excluding the evidence of his son's culpability for the crime, the Tenth Circuit noted that Colorado evidence rules allow for the exclusion of evidence of an alternative suspect of the crime without proof of some act directly connecting that suspect with the crime. *Matthews*, 83 F.3d at 332, *citing People v. Mulligan*, 193 Colo. 509, 568 P.2d 449 (1977). Because the evidence Matthews offered tending to show that his son had sexually assaulted the victims related to a time frame other than when Matthews was charged with sexually assaulting the victims, the court held that Matthews had no constitutional right to present the evidence. *Matthews*, 83 F.3d at 332. Finally, the Tenth Circuit summarily dismissed Matthews' claim that due process required admission of his hearsay evidence because the prosecution had

used hearsay evidence because it was "without merit." *Matthews*, 83 F.3d at 332. "Admission or exclusion of hearsay is not an exercise in scorekeeping." *Matthews*, 83 F.3d at 332.

The Ninth Circuit and Tenth Circuit are thus in almost complete disagreement. Unlike in the Ninth Circuit, in the Tenth Circuit criminal defendants have no constitutional right to present evidence inviting the jury to speculate. Unlike in the Ninth Circuit, in the Tenth Circuit a defendant's right to present evidence is not contingent upon what evidence the state is allowed to introduce.

Likewise, in *United States v. Wilson*, 160 F.3d 732 (D.C. Cir. 1998), *cert. denied*, 528 U.S. 828 (1999), the D.C. Circuit rejected a claim that Wilson had a constitutional right to present hearsay evidence that other persons may have committed the murder of which he was accused. In that case the government introduced evidence that the victim was a witness in Wilson's brother's trial for robbing a post office, having worn a wire while in jail and recorded incriminating statements. The prosecution's theory was that James and his brothers, including the defendant, learned of the victim's role as an informant and witness, and conspired and ultimately killed him. *Wilson*, 160 F.3d at 736. Evidence that the witness had been involved in other government investigations was admitted, but the names of defendants in those cases was excluded. Even though these other defendants obviously had the same motive to kill the victim as had been established by the prosecution, the D.C. Circuit held that Wilson's claim that his constitutional right to present a defense was violated was "meritless" because Wilson made no proffer that any

of those individuals had the opportunity to kill the victim. *Wilson*, 160 F.3d at 743.

In *Wilson* the defense evidence of other persons' motives was certainly "parallel" and of "similar import and character" to the prosecution's, as the defense wished to establish that many others had exactly the same motive to kill the victim as Wilson did – to prevent his testimony in a criminal trial. Yet the trial court constitutionally excluded such evidence on the basis that motive, without opportunity, is not evidence of sufficient magnitude to warrant constitutional protection. The Ninth Circuit's constitutional standard is thus irreconcilable with this case.

As noted above, the First Circuit allows admission of evidence that tends to incriminate another person only if there is a connection between that person and the crime. *United States v. Patrick*, 248 F.3d 11, 21 (1st Cir. 2001). In *DiBennedetto v. Hall*, 272 F.3d 1 (1st Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S.Ct. 1622 (2002), the First Circuit upheld this standard, as applied by the Massachusetts courts, against a habeas corpus challenge. DiBennedetto claimed that Massachusetts had violated his constitutional right to present evidence when it excluded evidence he claimed indicated that others were guilty of the murder for which he was convicted. The evidence related to a different murder, that of Vincent Limoli, which was allegedly mob related and to which, DiBennedetto claimed, the victims and one of the state's witnesses were connected. The First Circuit noted that the only actors the defendant was able to identify were not in the state at the time of the murder, "so the trial judge was left only with the murky figures of unnamed mob killers, whose existence in the shadows could possibly, but not likely, be

inferred from a complicated tale of the murder of Vincent Limoli." *DiBennedetto*, 272 F.3d at 9. The unreliability of this evidence, combined with its tendency to disparage the victims and its tangential nature, satisfied the First Circuit that the state court's evidentiary ruling did not constitute a constitutional violation. *DiBennedetto*, 272 F.3d at 9.

Although it may have been a close question for the First Circuit, underlying its opinion is the conclusion that there must be some evidence validly showing the possibility that another person committed the crime before a defendant's constitutional rights will encompass such evidence. The First Circuit has thus rejected the idea that a defendant's constitutional right to present evidence extends to even speculative evidence.

The Ninth Circuit decision in this case is also contrary to the Eleventh Circuit's holding in *Cikora v. Dugger*, 840 F.2d 893 (11th Cir. 1988). Cikora challenged his Florida conviction for burglary on habeas corpus. One of his claims was that the trial court violated his constitutional right to present evidence by excluding evidence that another man committed the crime. The evidence was that the other man lived near the victim and matched the victim's description. Cikora relied upon *United States v. Robinson*, 544 F.2d 110 (2d Cir. 1976), *cert. denied,* 434 U.S. 1050 (1978), where Robinson's robbery conviction was reversed because the trial court excluded evidence that another man, who had also been a suspect, resembled the surveillance photo of the robber. The Eleventh Circuit distinguished *Robinson*, however, noting that the reversal there had been strictly a ruling on the admissibility of evidence, not a constitutional violation under habeas corpus. *Cikora*, 840 F.2d at 897-98. The court stated that federal habeas reversals of state

court convictions for exclusion of evidence of third-party guilt had occurred "only when there was some demonstration of connecting another person to the particular crime for which the defendant was on trial." *Cikora*, 840 F.2d at 898. Thus, the court stated, "Due process may require a trial court to allow the introduction of evidence of another party's possible guilt when there is some showing of a nexus between the other party and the particular crime with which a defendant is charged." *Cikora*, 840 F.2d at 898. Because Cikora had made no such showing, the court held that he failed to show any constitutional violation. *Cikora*, 840 F.2d at 898.

The Eleventh Circuit's holding that a defendant's constitutional rights to present evidence "may" extend to evidence of a third party's guilt only if the defendant makes "some showing of a nexus between the other party and the particular crime" is directly contrary to the Ninth Circuit's holding that a defendant's constitutional right to present evidence extends to even evidence of speculative theories of another's guilt.

The evidence in question was Reeda Roundy's hearsay statements that her ex-boyfriend, J. W. Dyer had, nine months before the murders, stalked and threatened to kill her, and that he was a "mercenary." No evidence actually tied Dyer to the crime, however. In fact, the only evidence of Dyer's whereabouts on the night of the murders was that he was in a different state. *See* App., *infra*, 49-55 (Trott, J., dissenting). The defense theory that J. W. Dyer committed the murders was thus speculative, as there was nothing to connect Dyer to the crime and no proffer of evidence that Dyer had the opportunity to commit the murders.

The Ninth Circuit is apparently the only jurisdiction with an evidentiary standard that allows a defendant to present speculative evidence that another person committed the crime. By elevating this evidentiary standard to constitutional significance, the Ninth Circuit has effectively declared unconstitutional the evidentiary standards of all other jurisdictions to consider the issue. The Ninth Circuit is also in conflict with holdings from the First, Tenth, Eleventh and D.C. Circuits, which have explicitly or implicitly upheld against constitutional challenge evidentiary standards that allow for the exclusion of speculative evidence of third party guilt. Petitioner respectfully requests this Court to resolve this conflict.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals,
Ninth Circuit.

William L. GRAY, Petitioner-Appellant,
v.
Joseph KLAUSER, Warden Respondent-Appellee.

No. 00-35732.

Argued and Submitted May 7, 2001
Filed Feb. 27, 2002.

Maynard D. Grant, Grant & Newcomb, Seattle, WA, for the petitioner-appellant.

Kenneth M. Robins, Deputy Attorney General, Boise, ID, for the respondent-appellee.

Appeal from the United States District Court for the District of Idaho, B. Lynn Winmill, District Judge, Presiding. D.C. No. CV-98-00387-BLW.

Before: LAY,* TROTT, and BERZON, Circuit Judges.

BERZON, Circuit Judge:

Idaho state prisoner William Gray was convicted of killing his wife, Betty Gray, and her friend, Reeda Roundy. Gray unsuccessfully sought relief in the Idaho state court system before filing a habeas petition in federal court pursuant to 28 U.S.C. § 2254. The district court denied the

* The Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

petition but granted a certificate of appealability for each of Gray's claims. Because we find that the Idaho trial court's ("trial court") rulings regarding the admission of hearsay evidence violated Gray's constitutional rights and that the requisite harmless error standard was met, we reverse.

I. Facts

On July 24, 1989, LeRoy Leavitt went to the Idaho Falls, Idaho home of Reeda Roundy. There, he found Roundy and Betty Gray, Roundy's best friend and Leavitt's lover, dead from gunshot wounds to the head. After more than two years of investigation of four suspects, the government indicted Betty Gray's husband of 29 years, William Gray, for the murders and a related burglary count.

A. The State's Theory

According to the state, after learning that Betty Gray was having an affair with Leavitt and that she wanted a divorce, Gray hatched a plan to kill his wife and took steps to ensure that he would not get caught: First, Gray bought a 1971 International Travelall and registered it under a false name. Then, in the early morning hours of July 24, 1989, Gray drove the Travelall from his home in Jackson Hole, Wyoming, to the Eastern Idaho Medical Center in Idaho Falls, Idaho. Gray parked the Travelall at the Medical Center, and then rode his bicycle 3.6 miles to Roundy's home, where Betty Gray had spent the night.

At Roundy's home, the government claimed, Gray shot both Betty Gray and Roundy in the head with a 9mm

handgun. The prosecution theorized that Gray arranged the scene to appear as the site of a ritualistic cult killing, hoping to deflect suspicion from himself. Then, Gray rode the bike 3.6 miles back to the medical center and drove the Travelall back to Jackson Hole. There was also evidence that Gray initially lied during the investigation as to several matters, including whether he owned a vehicle similar to the Travelall, why, and what happened to it.

B. The Defense

Gray's defense consisted of two related claims: that he was not the murderer and that someone else was. Regarding the claim that he was not the murderer, Gray asserted that he was not in Idaho Falls on the night in question. He testified also that he did not know about Betty Gray's affair with Leavitt until after the murders. Gray emphasized that the State had no fingerprints linking him to the crimes, and that the State produced little other physical evidence. Moreover, Dr. Karen Servilla, Gray's treating physician, opined that because of his poor medical condition, Gray was physically unable to ride his bicycle the 7.2 mile round-trip in the time theorized by the government. Gray also explained that he had bought the Travelall for someone else as part of his pawnshop business, although that person was never found.

The second part of Gray's defense posited that somebody else was the real killer, and Gray pointed in several directions. Aside from emphasizing the ritualistic overtones of the crime scene, Gray postulated that one of three people – Leavitt, Houston Riley (Roundy's current lover), or J.W. Dyer (Roundy's previous lover) – was responsible for the murders.

C. The Photo Line-up

The key to the state's case was Steve Mackley, a security guard at the Eastern Idaho Medical Center. Around 3:00 a.m. on July 24, 1989, Mackley saw a middle-aged man ride a bicycle into the medical center parking lot and put the bicycle into a vehicle with Wyoming license plates. In statements to the police, Mackley described the vehicle variously as a Jeep, as a "Suburban-type" vehicle, and as perhaps an International.

Suspicious, Mackley approached the man and questioned him. The parking lot was dark, Mackley told the jury, but he scanned a flashlight beam over the man's face. For approximately sixty seconds Mackley spoke with a middle-aged Caucasian man with rosy red cheeks who was sweating profusely and was out of breath. The man, who wore a medical identification bracelet and glasses, told Mackley that he was picking up the vehicle for friends from Jackson Hole, Wyoming.

After news of the murders spread, Mackley contacted the police and told them what he had seen. When asked to help a police artist create a composite sketch of the mystery man, Mackley fairly accurately described Gray with one significant exception: he claimed that the man with whom he had spoken was clean-shaven, stating "No mustache, no beard, or anything." Gray was sporting a full beard on the night in question.

Three days later, when the police showed him a five-person photographic line-up,[1] Mackley selected the bearded Gray, stating that "the person I remember to a tee was in photograph 3 [Gray]." Because he was "concerned" about the facial hair, however, Mackley asked the police how recently the photograph had been taken.

Then, a few days later, Mackley coincidentally ran into Gray at a hospital, and immediately identified Gray as the man from the medical center parking lot with the bicycle and Travelall. As Mackley put it: "The facial hair didn't throw me off again, because I'd seen it in the picture."

Gray sought to prevent the state from introducing Mackley's statements identifying Gray as the mystery bicycle-rider. Gray argued that the manner in which the photographic array was arranged called attention to Gray and thus was unduly suggestive. In the array, Gray's picture is the only one with a dark pink tint; also, only Gray and one other man are shown wearing glasses. That other man is wearing sunglasses while Gray is depicted looking out over the top of reading glasses, a characteristic Mackley had noted regarding the person he saw. Gray contended that for these reasons and others, the array was unduly suggestive, and that the identifications were fruits of that unduly suggestive line-up. The trial court rejected Gray's argument, finding that the array was not unduly suggestive, and that even if it was, Mackley's identifications were sufficiently reliable to be admitted. The Idaho

[1] Actually, the photograph array consisted of six photos. Mackley acknowledged that he knew the person in photograph 6.

Court of Appeals found the array to be unduly suggestive, but held that Mackley's identification was "sufficiently reliable to outweigh the low level of suggestiveness in the identification procedures." *State v. Gray,* 129 Idaho 784, 798, 932 P.2d 907, 921 (Ct.App.1997). The federal district court in its decision on habeas review tracked the reasoning of the state appeals court.

D. The Hearsay Evidence

At trial, both sides sought to present hearsay evidence in order to advance their respective theories of the case. Through the testimony of Betty Gray's sister, Joann Buccola, the state sought to introduce hearsay statements made by Betty Gray that, by supplying Gray with a motive, made it appear more likely that he was the killer. Likewise, the defense attempted to introduce hearsay statements made by Roundy, through the testimony of Roundy's two children, her best friend, and Riley, the man who was her lover at the time of her death. These statements made it appear more likely that Roundy's former lover, Dyer, was the killer, as he had threatened and stalked Roundy.

Over Gray's objections, the trial court allowed the state to introduce some of Betty Gray's hearsay statements. Before so ruling, the trial court held a pre-trial suppression hearing to consider the admissibility of these statements. Buccola testified at that hearing about several conversations she had with her deceased sister.[2] Following

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[2] The reason the prosecution gave for presenting Buccola as a live witness before the judge was that the statements she testified to were

(Continued on following page)

the hearing, the trial court ruled that the state could not introduce Betty Gray's statement that she feared her husband, because the statement was not material. The court did, however, allow Buccola to testify at trial that Betty Gray said that she was having an affair and wanted a divorce, that Gray had learned about the affair and desire for divorce, that Gray had asked her to keep it secret, and that Gray became angry when she divulged the secret. The trial court concluded that one of these statements (that Betty Gray told Gray she wanted a divorce) was not hearsay, and that the rest were relevant statements of fact that bore particularized guarantees of trustworthiness and thus were admissible under Idaho's residual exception to the hearsay rule, IDAHO R. EVID. 803(24) ("Rule 803(24)").

The trial court did not, however, allow Gray to introduce any of the hearsay statements attributable to Roundy. Roundy's statements indicated, first, that she was afraid of Dyer, and, second, the reasons for her fear, including that Dyer had stalked her, that he had threatened to kill her, and that the police had told her that Dyer was a "mercenary."[3] The trial court first ruled that these statements could not come in under Idaho's state of mind hearsay exception, IDAHO R. EVID. 803(3) ("Rule 803(3)"). It reasoned – as it did with regard to similar statements by Betty Gray – that the statements relating

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different in some ways from those contained in the government's prehearing written submissions.

[3] The record does not elaborate on the definition of "mercenary" except to say that Dyer was "a military-involved individual, who owns a sporting goods store . . . with access to numerous weapons."

to Roundy's state of mind were immaterial and thus inadmissible. It then held that the reasons for Roundy's fear were statements of fact, and thus did not qualify for admission under the state of mind hearsay exception.

The trial court next considered the admissibility of Roundy's statements under Idaho's residual hearsay exception, Rule 803(24). Here, the trial court held once again that because the statements relating to Roundy's state of mind were not material, they were inadmissible. As to the statements that indicated the factual reasons for Roundy's state of mind, the trial court held that because they failed to qualify for admission under Idaho's state of mind hearsay exception, they also did not qualify for admission under Idaho's residual hearsay exception.[4] In two oral rulings during trial, the trial court repeated this reasoning.

E. Proceedings

Following trial, the jury returned a verdict of guilty on two counts of first degree murder and one count of first degree burglary. Gray appealed to the Idaho Court of Appeals, which affirmed. *Gray,* 129 Idaho 784, 932 P.2d 907. Gray then filed a petition for review with the Idaho Supreme Court, and, after it was denied, a petition for Writ of Certiorari with the United States Supreme Court, also denied.

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[4] The trial court's rulings on this question are described in more detail, *infra,* where we discuss the hearsay admissibility issue on the merits.

Gray filed a timely petition for habeas relief. Gray and respondent Joseph Klauser, the warden of the Idaho State Correctional Institution, filed cross summary judgment motions. The district court granted the warden's motion and denied Gray's. Gray now appeals that ruling.

II. ANALYSIS

Gray raises four issues in this appeal. He argues that the photo line-up procedure was so suggestive that it denied his constitutionally-protected right to due process. He raises a second due process issue, claiming that the trial court failed to poll all jurors regarding prejudicial mid-trial publicity. Gray claims, thirdly, that the trial court violated his rights under the Confrontation Clause of the Sixth Amendment by admitting the hearsay statements of Betty Gray. Finally, Gray argues that the trial court violated his due process rights by suppressing hearsay statements made by Roundy. We address these contentions in turn.

A. The Photographic Line-up

Assuming – without deciding – that the five-person photo array was somewhat suggestive, we are convinced that under the circumstances Mackley's eyewitness identification was sufficiently reliable to have been presented to the jury. *Manson v. Brathwaite,* 432 U.S. 98, 114, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *Neil v. Biggers,* 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). In determining whether an eyewitness' identification is sufficiently reliable to outweigh the suggestiveness of a photo array, we consider, among other things: (1) the opportunity of the witness to view the criminal at the time

of the crime; (2) the witness' degree of attention; (3) the accuracy of his prior description; (4) the level of certainty demonstrated at the identification; and (5) the length of time between the crime and the identification. *Brathwaite,* 432 U.S. at 114, 97 S.Ct. 2243.

Mackley had a fairly good opportunity to view the mystery bicycle rider. He spoke with the man at close range for approximately sixty seconds. Although it was dark, Mackley scanned a flashlight beam across the man's face several times.

Mackley's degree of attention was relatively high. An onduty security guard at the time of the encounter, his attention was piqued because he suspected that the man was illegally siphoning gas or hot-wiring a car.

Mackley's pre-line-up description was accurate in several ways. Mackley described the person in the parking lot as a Caucasian, middle-aged man, with flushed cheeks and a ruddy complexion, who wore glasses and a medical identification bracelet. Each description matched Gray. Also, Mackley accurately described the International Travelall vehicle with fair accuracy, including its Wyoming license plates.[5] However, the fact that Mackley remembered the man as clean-shaven, while Gray had a significant beard, appreciably undercuts the accuracy of his description. *See Tomlin v. Myers,* 30 F.3d 1235, 1241-42 (9th Cir. 1994) (questioning the accuracy of an identification where witness stated perpetrator had a "two-inch

[5] Mackley vacillated somewhat before and during trial in describing the precise color of the vehicle, its brand, and the manner in which the tailgate operated.

afro" and defendant had a "shoulder-length straightened permanent hair style").

Mackley was fairly sure at the photo line-up that Gray was the man he had encountered in the medical center parking lot. He stated that Gray was "the person I remember to a tee." Mackley was concerned, however, about Gray's facial hair, and asked when the photo was taken.

Finally, the time between Mackley's encounter with the mystery bicycle-rider and his selection of Gray at the photo line-up was short: three days.

Under these circumstances, there is not "a very substantial likelihood of irreparable misidentification [, and] [s]hort of that point, such evidence is for the jury to decide." *Brathwaite,* 432 U.S. at 116, 97 S.Ct. 2243 (internal quotation and citation omitted).

B. Juror Polling

Upon Gray's request, the trial court polled the jury members about their exposure to potentially adverse mid-trial publicity. In his brief to this court, Gray argued, as he had on appeal in the state courts and in the federal district court on habeas, that the trial judge inadvertently bypassed one juror and that this failure denied him his right to an impartial jury. The state appeals court and the district court accepted the factual representation but held that there was no error of constitutional dimensions. As Gray's appellate counsel acknowledged during oral argument, however, a careful reading of the transcript shows that the trial judge *did* poll each of the twelve jurors and two alternates. There was no error.

C. Betty Gray's Hearsay Statements

Gray challenges the trial court's decision to allow some of Betty Gray's out-of-court statements under Idaho's residual hearsay exception, Rule 803(24), as violative of Gray's Sixth Amendment right to confront witnesses. When a declarant is unavailable to testify, the Confrontation Clause countenances hearsay only if it demonstrates adequate indicia of reliability either by (1) falling within a firmly rooted hearsay exception; or (2) bearing particularized guarantees of trustworthiness. *See Idaho v. Wright,* 497 U.S. 805, 815, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). Idaho's residual hearsay exception, under which the challenged statements were admitted, is not a firmly rooted hearsay exception. *Id.* at 817, 110 S.Ct. 3139. The question raised by Gray's Sixth Amendment challenge, consequently, is whether Betty Gray's statements admitted under the residual hearsay exception bore particularized guarantees of trustworthiness.

The government presented the testimony of Buccola as to the situational background of Betty Gray's statements. As the federal district court observed, the trial court engaged in precisely the process that the Supreme Court has suggested is necessary to determine the trustworthiness of hearsay statements and thereby protect the defendant's rights under the Confrontation Clause. *Id.* at 818-20, 110 S.Ct. 3139. Moreover, the trial court found trustworthiness on the basis of some of the factors that the Supreme Court has approved as particularized guarantees of trustworthiness, including spontaneity, consistent repetition, state of mind, and lack of motive to fabricate (although not all of the statements admitted had all these characteristics). *Id.* We conclude that the trial court's

inquiry into the trustworthiness preceding the introduction of Betty Gray's hearsay statements, while truncated in some respects, was sufficient under *Wright* to preclude a violation of the Confrontation Clause.

D. Roundy's Hearsay Statements

The trial court did commit a different constitutional error, though, in connection with its decision to admit Betty Gray's hearsay statements. Although the court admitted her statements, which favored the government's position, it refused to admit parallel hearsay statements by Roundy. In these statements, Roundy indicated that Dyer had threatened her life and stalked her. Had the court applied the reasoning used to exclude Roundy's statements to Betty Gray's statements, it would have excluded those statements as well.

This asymmetrical application of evidentiary standards is unconstitutional. A state may not arbitrarily prevent a defendant from presenting evidence that is material, trustworthy, and important to his defense. In allowing the prosecution, but not the defense, to use Rule 803(24) to admit hearsay evidence of similar import and character, the trial court violated the constitutional prohibition against arbitrary application of evidentiary standards to defendants.

1. The Basis for the Trial Court Ruling

The Idaho Court of Appeals on direct review, *Gray*, 129 Idaho at 795, 932 P.2d at 918, and the district court on habeas review affirmed the facially asymmetrical rulings on similar evidence on an abuse of discretion standard,

ruling that the trial court was entitled to conclude that the evidence offered by the prosecution bore particularized indicia of trustworthiness while that offered by the defense did not. A close look at the record, however, indicates that the trial court's decision was not based on any concern about the trustworthiness of the statements. Instead, the trial court acted on a thrice-repeated substantive analysis that could have been used to exclude to [sic] Betty Gray statements but was not.

The reasons the trial court actually gave for rejecting the hearsay evidence offered by Gray were that (1) the evidence was not material to the case and (2) because the evidence did not qualify for admission under Idaho's state of mind hearsay exception, Rule 803(3), it also did not qualify for admission under its catch-all hearsay exception, Rule 803(24). These reasons formed the basis of the trial court's holdings on each of the three occasions that the trial court considered the admissibility of the Roundy hearsay evidence offered by the defense. Not once did the court pass judgement on whether the Roundy statements bore particularized guarantees of trustworthiness or indicate that they did not.[6]

In its initial, written disposition, the trial court first analyzed the admissibility of the Roundy hearsay evidence under Idaho's state-of-mind hearsay exception, Rule 803(3).[7] To conduct this analysis, the trial court divided the

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[6] Indeed, as we discuss later, it is clear from the record that Gray adequately met the trial court's only request for an offer of proof concerning the situational context of the Roundy statements.

[7] When the declarant is unavailable, Rule 803(3) allows for the admission of:

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hearsay into two categories: the parts of Roundy's statements regarding (1) her state of mind; and (2) the factual reasons for her state of mind. The latter included Roundy's statements that "(1) she had heard that Dyer was a mercenary; (2) Dyer had threatened to kill her; (3) Dyer had followed her around; and (4) Dyer kept calling her and always seemed to know her address." The court declared the statements regarding Roundy's state of mind immaterial and thus inadmissible. It then held that the statements indicating the reasons for Roundy's state of mind were statements of fact and thus did not qualify for admission under the state of mind hearsay exception.

The next section of the trial court's written disposition analyzed the hearsay evidence under Idaho's residual hearsay exception, Rule 803(24).[8] Here, the trial court

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> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

[8] When the declarant is unavailable, Rule 803(24) allows for the admission of:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in

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held, once again, that because the statements relating to Roundy's state of mind were not material, they were inadmissible. As to the parts of the statements that indicated the factual reasons for Roundy's state of mind, the trial court stated, in passing, that because they failed to qualify for admission under Idaho's state of mind hearsay exception, they also did not qualify for admission under Idaho's residual hearsay exception.[9]

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advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

[9] The following is the trial court's written analysis regarding the admissibility of Roundy's statements under Rule 803(24) (emphasis added):

> Gray also offers the foregoing statements under the "catch-all" exception to the hearsay rule under Rule 803(24), I.R.E. In order for a statement to be admissible under Rule 803(24), I.R.E., the court must find, among other things, that "the statement is offered as evidence of a material fact." The majority of courts have held that a victim's stated fear of a person is only evidence of a material fact under the circumstances enumerated above: i.e., (1) where a defendant raises a claim of self-defense, suicide or accidental death and the declarant-victim feared such defendant; and (2) where the declarant-victim's fear of a defendant is offered to rebut a claim by the defendant that the defendant's relationship with the victim was good. However, at least one court has held that a victim's stated fear of a person is probative evidence of the identity of the killer and, therefore, evidence of a material fact. *See State v. Gause,* 107 Ariz. 491, 489 P.2d 830, 833 (1971).
>
> Because this court is of the opinion that evidence of one person's state of mind is only minimally probative of the state of mind of another, and because the view adopted in *Gause, supra,* would, in effect, allow evidence of one person's state of mind to be introduced as evidence of the state of mind of

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Two days later, the trial court reaffirmed its ruling in a brief oral statement. In denying the defense's renewed request that the trial court admit the hearsay evidence, the trial judge reaffirmed the reasoning in its written order.[10] Just as in its earlier written order, the trial court did not focus on the facts of which Roundy spoke or the circumstances in which the remarks were uttered, and therefore did not indicate in any way that it believed the hearsay statements regarding these facts lacked particularized guarantees of trustworthiness.

Two weeks later, the trial court again considered the admissibility of the hearsay evidence under Rule 803(24). Again, the trial court issued its ruling orally.[11] And, again,

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another (i.e. it would permit a victim's fear of a particular person to be introduced as probative evidence of such person's murderous intent), this court is inclined to follow the majority view. Therefore, having concluded herein that Roundy's statements that she feared Dyer *and her reasons for such fear* do not fall within either of the circumstances which would allow the statements to be admitted as evidence under Rule 803(3), I.R.E., it follows that such statements are also inadmissible under Rule 803(24), I.R.E.

[10] The following is the court's first oral analysis regarding the admissibility of Roundy's statements:

> [F]or the reasons that I stated in my written opinion, I don't think that the statements that were presented to me for review fall within any exception to the hearsay rule.
>
> And, therefore, I'm going to stand by written decision. So I will allow that limited interrogation as to Mr. Rodriguez concerning this particular suspect, but I'm not going to allow you to get into hearsay statements that we addressed in the prior hearing.

[11] The following is the court's second oral analysis regarding the admissibility of Roundy's statements under Rule 803(24) (emphasis added):

(Continued on following page)

the trial court mentioned the "reasons" for Roundy's fears – that is, the facts concerning her former lover's behavior – only in general and only in passing. Never did the trial court indicate that the requisite guarantees of trustworthiness were lacking. Instead, it is apparent that, given the trial court's rulings, any offer by Gray to put on a witness to show trustworthiness would have been refused, on the ground – thrice repeated – that the evidence was simply immaterial, however trustworthy.

2. Applicable Constitutional Principles

a. Constitutional Protections

Under 28 U.S.C. § 2254(d)(1), a federal court may grant an application for a writ of habeas corpus for a claim

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All right. I have ruled on this at least twice before. I issued a written opinion at an earlier date, and at that time I pointed out that the majority of courts have held that a victim's stated fear of a person is only evidence of a material fact under the circumstances enumerated in Rule 803, sub part 24; that is, where a defendant raises a claim of self defense, suicide, or accidental death, and the declarant victim feared such defendant, and where the declarant victim's fear of a defendant is offered to rebut a claim by the defendant that the defendant's relationship with the victim was good.

. . . .

Therefore, it seems to me that Reeda Roundy's statements that she feared Mr. Dier [sic] *and her reasons for such fear* don't fall within either of the circumstances which would allow the statements to be admitted as evidence under Rule 803, sub part 3, and it would also follow that such statements would not be admissible under Rule 803, sub part 24.

So I will affirm my prior ruling on that issue and sustain the state's objection to that evidence.

adjudicated in a state court if – and only if – that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Supreme Court has held that the clauses "contrary to" and "unreasonable application of" have independent meaning. *Penry v. Johnson,* 532 U.S. 782, 121 S.Ct. 1910, 1918, 150 L.Ed.2d 9 (2001); *Williams v. Taylor,* 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *see Packer v. Hill,* 277 F.3d 1092, 1101 (9th Cir. 2002). The "contrary to" clause applies, *inter alia,* when a state "applies a rule that contradicts the governing law set forth" in the Supreme Court's cases; the "unreasonable application of" clause applies when a state identifies the correct legal standard but applies it unreasonably. *Penry,* 121 S.Ct. at 1918 (quoting *Williams,* 529 U.S. at 404, 120 S.Ct. 1495). Because the Idaho state courts did not apply the pertinent constitutional rules established by the Supreme Court, discussed below, they applied an incorrect legal standard. Thus, the "contrary to" clause governs in this case, and the only questions remaining are (1) whether there was constitutional error; and (2) "whether the error had a substantial or injurious effect on the verdict." *Packer,* 277 F.3d at 1102 (citing *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)).

Two principles of constitutional law, both clearly established by Supreme Court precedent, figure prominently in determining whether there was constitutional error in this case. First, a state rule or ruling may not arbitrarily deprive a defendant of his right to present a defense or his right to present witnesses on his behalf.

Second, a state rule or state judge may not without justification impose stricter evidentiary standards on a defendant desiring to present a witness' testimony than it does on the prosecution.

These rules emanate from the general principles that in our system of justice, a defendant has the fundamental rights to present a defense and to present witnesses. For more than fifty years, the Supreme Court has clearly and repeatedly articulated these core constitutional guarantees.

In 1948, Justice Black, writing for the Supreme Court, declared that a defendant's "right to his day in court" is "basic in our system of jurisprudence" and includes "as a minimum, a right to examine the witnesses against him, *to offer testimony,* and to be represented by counsel." *In re Oliver,* 333 U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948) (emphasis added). Since then, the Supreme Court has again and again noted the "fundamental" or "essential" character of a defendant's right both to present a defense, *Crane v. Kentucky,* 476 U.S. 683, 687, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); *Webb v. Texas,* 409 U.S. 95, 98, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); *Washington v. Texas,* 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), and to present witnesses as a part of that defense. *Taylor v. Illinois,* 484 U.S. 400, 408, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); *Rock v. Arkansas,* 483 U.S. 44, 55, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *Chambers v. Mississippi,* 410 U.S. 284, 294, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Webb,* 409 U.S. at 98, 93 S.Ct. 351; *Washington,* 388 U.S. at 19, 87 S.Ct. 1920. The Court has variously stated that an accused's right to a defense and right to present witnesses emanate from the Sixth

Amendment, *Taylor,* 484 U.S. at 409, 108 S.Ct. 646; *United States v. Valenzuela-Bernal,* 458 U.S. 858, 867, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982), the Due Process Clause of the Fourteenth Amendment, *Rock,* 483 U.S. at 51, 107 S.Ct. 2704; *Trombetta,* 467 U.S. at 485, 104 S.Ct. 2528; *Chambers,* 410 U.S. at 294, 93 S.Ct. 1038; *Webb,* 409 U.S. at 97, 93 S.Ct. 351; *Oliver,* 68 S.Ct. at 507, or both. *Crane,* 476 U.S. at 690, 106 S.Ct. 2142; *Strickland v. Washington,* 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Washington,* 388 U.S. at 17-18, 87 S.Ct. 1920.

The Sixth Amendment source of these rights is the Compulsory Process Clause, which embraces "the right to have the witness' testimony heard by the trier of fact." *Taylor,* 484 U.S. at 409, 108 S.Ct. 646. *Washington* formally incorporated the Compulsory Process Clause into the Due Process Clause of the Fourteenth Amendment. 388 U.S. at 17-19, 87 S.Ct. 1920. That case stated:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19, 87 S.Ct. 1920.

A state court may violate a defendant's right to present a defense and witnesses by applying evidentiary standards in an arbitrary or uneven way. In *Washington,* for example, the Supreme Court held that a Texas rule

that prevented an accomplice from testifying on a defendant's behalf arbitrarily denied the defendant his right to offer the testimony of a witness. 388 U.S. at 23, 87 S.Ct. 1920. Similarly, in *Rock,* the Supreme Court held that Arkansas' per se rule excluding all hypnotically refreshed testimony was an arbitrary infringement of the defendant's right to present testimony. The Court stated that a state's restrictions on testimony may not be arbitrary, 483 U.S. at 55-56, 107 S.Ct. 2704; that a state "may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand;" and that a state "may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony." *Id.* at 55, 107 S.Ct. 2704.

In addition to ruling that a state may not arbitrarily apply evidentiary standards, the Supreme Court has also focused its criticism on a particular variety of arbitrariness: the unjustified and uneven application of evidentiary standards in a way that favors the prosecution over defendants. In *Green v. Georgia,* 442 U.S. 95, 97, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam), the Supreme Court reversed a death penalty sentence because the trial court had excluded testimony offered by the defense under Georgia's hearsay rules. While Georgia's hearsay rules did not allow the admission of evidence that would have been exculpatory in Green's sentencing hearing, the state's rules did allow the government to introduce the same evidence in his co-defendant's trial. The Supreme Court held the exclusion of the evidence at sentencing to be reversible error, listing several reasons why the trial court should have admitted the hearsay testimony. The Court concluded: "Perhaps most important the State considered

the testimony sufficiently reliable to use it against [Green's co-defendant], and to base a sentence of death upon it." *Id.*

Other cases confirm and apply the principle that a state rule or ruling that imposes a greater evidentiary burden on a defendant without justification violates due process. In *Webb,* for example, the trial judge admonished the defendant's witness at length to testify truthfully, but did not give similar warnings to the state's witnesses. As a result of the trial judge's lecture, the defendant's witness refused to testify. The Supreme Court ruled that the "trial judge gratuitously singled out this one witness," and held that the witness' subsequent refusal to testify deprived the defendant of due process. 409 U.S. at 97-98, 93 S.Ct. 351.

Similarly, in *Washington,* the Supreme Court objected to a Texas rule that applied unequal standards to defendants and the state. Under the Texas rule, an accomplice could testify for the state but not for the defendant. The Court ruled that this distinction was not rational. 388 U.S. at 22, 87 S.Ct. 1920. Justice Harlan, in concurrence, emphasized the arbitrariness and unevenness of this distinction. He stated that the different rules applicable to the state and the defendants violated the Due Process Clause, because a state may not recognize as relevant and competent the testimony of a certain category of witness but arbitrarily bar use of testimony by that same kind of witness by the defendant. *Id.* at 24-25, 87 S.Ct. 1920; *see also Chambers,* 410 U.S. at 295-98, 93 S.Ct. 1038 (unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness); *Cool v. United States,* 409 U.S. 100, 103 n. 4, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972) (jury instruction telling

the jury that it could convict solely on the basis of accomplice testimony but not that it could acquit on this basis constituted grounds for reversal).

Here, the trial court indubitably applied Idaho's residual hearsay exception arbitrarily and unevenly. With no explanation at all, the trial court used two completely different analytical frameworks when considering the prosecution and defense's hearsay evidence under Rule 803(24). The trial court's analysis diverged in at least three significant ways, explained below, depending on whether the evidence was offered by the prosecution or the defense. Not surprisingly, the different Rule 803(24) analysis used by the trial court resulted in diametrically opposite rulings: While the trial court rejected the defense's hearsay evidence, it admitted substantially parallel hearsay evidence submitted by the prosecution.

The *first,* and most important, difference between the trial court's Rule 803(24) analytical frameworks was that the trial court considered whether hearsay statements *of fact* offered by the prosecution were material to the case, but did not consider materiality when the defense offered hearsay statements of fact. In three different instances, the trial court admitted a hearsay statement *of fact* offered by the prosecution after devoting a paragraph of its analysis to consideration of whether the statement was material to the case. In these instances, the trial court noted that two of the comments "tend to prove that Gray was the killer," and a third comment "established a motive for the killing." Based on these careful analyses, the trial court held all three statements material to an issue in the case, and therefore admissible under Rule 803(24).

In contrast, when the trial court declared inadmissible the hearsay statements of fact offered by the defense, the trial court did not once consider whether the statements were material to the case – even though the trial court explicitly acknowledged that some of the hearsay statements offered by the defense were statements of fact.[12] Instead of considering whether the hearsay statements of fact were material when determining their admissibility under Rule 803(24), the trial court conducted a detailed examination as to why the hearsay statements *relating to Roundy's state of mind* were not material. This failure to consider the materiality of the defense's hearsay statements of external fact, lumping them in instead with the state of mind facts, was critical: As a result of that merging of diverse statements, the external fact statements were rejected summarily for lack of materiality, with no pertinent analysis or explanation.

The *second* way in which the trial court's Rule 803(24) analysis differed depending on the party was that the trial court gave preclusive effect to its findings under Rule 803(3) when it considered the defense's evidence but not when it considered the prosecution's. Although the trial court used a different analytical framework when considering the two parties' hearsay evidence under Rule 803(24), at least one aspect of the analysis was consistent: In each case, the Rule 803(24) analysis immediately

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[12] Immediately prior to considering the defense's proffer under Rule 803(24), the district court wrote (emphasis added): "Because *Roundy's stated reasons for her fear of Dyer are statements of fact,* such statements are also not admissible under the 'state of mind' exception in Rule 803(3), I.R.E."

followed consideration of the same evidence under Rule 803(3). When the trial court moved onto the Rule 803(24) analysis on behalf of the prosecution, it began its consideration of the hearsay evidence anew, but, inexplicably, did not accord this advantage to the defense.

For example, the trial court admitted under Rule 803(3) a statement offered by the prosecution indicating the reasons Betty Gray feared that Gray had discovered her affair with Leavitt. In its decision, the court noted that the statement was one of fact, making it inappropriate for admission under the state of mind hearsay exception. Then, the trial court moved on to consider the same statement under the 803(24) hearsay exception, ruling that the "statement may be offered under Rule 803(24), I.R.E. to prove the facts asserted therein."

Just as the trial court would not admit the prosecution's evidence described above under the state of mind hearsay exception because it was a statement of fact, the trial court also did not admit the defense's hearsay statement of fact evidence under the state of mind hearsay exception. This time, though, when the court moved on to consider the admissibility of the evidence under the residual hearsay exception, it viewed its prior analysis under Rule 803(3) as dispositive.

The *third* way that the trial court's analytical structure under Rule 803(24) differed depending on the identity of the party was that the trial court included a pro-admissibility factor in its analysis only when considering the admissibility of the evidence submitted by the prosecution. In admitting the prosecution's hearsay testimony, the trial court consistently gave weight to the factor that "the

interests of justice are best served when the jury is presented with as much information as possible about the case." Despite this factor's *constitutional* significance with regard to statements offered by the *defense, see Washington,* 388 U.S. at 19, 87 S.Ct. 1920 (right to offer testimony is "in plain terms . . . the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies"), and although defense counsel argued that the jury should be allowed to see the whole picture, the trial court did not consider it when determining the admissibility of the hearsay statements offered by Gray. The trial court gave no explanation for why the prosecution was accorded the benefit of this pro-admissibility factor but the defense was not. Nor can we think of any explanation for such treatment.

Judge Trott, in dissent, suggests that the Roundy factual statements excluded were not analytically parallel in their content to some of the Betty Gray statements that the court admitted, but he never explains why not. We cannot perceive any pertinent difference. Why, for example, do Betty Gray's statements that Gray was angry with Betty Gray "tend to prove that Gray was the killer," while Roundy's statements that Dyer threatened her life do not tend to prove that Dyer was the killer? We conclude that the trial court, careful though it was as to other matters, in this instance applied entirely divergent analyses and came to irreconcilable results regarding the substantive admissibility of the out-of-court statements by the two victims.

b. The Limits of the Constitutional Protections

The above analysis demonstrates that the trial court arbitrarily denied Gray his right to present a defense and witnesses. But so to conclude does not settle the constitutional issue before us. The right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal process." *Chambers,* 410 U.S. at 295, 93 S.Ct. 1038; *see also Rock,* 483 U.S. at 55, 107 S.Ct. 2704. A state's restriction on a defendant's right to present evidence may not rise to constitutional error if the evidence is immaterial, unimportant, or untrustworthy.

(i) Materiality and Importance to the Defense

To establish a violation of the constitutional right to present a witness, a defendant must make a "plausible showing of how [the] testimony would have been both material and favorable to his defense." *Valenzuela-Bernal,* 458 U.S. at 867, 102 S.Ct. 3440; *see also Rock,* 483 U.S. at 51, 107 S.Ct. 2704; *United States v. Scheffer,* 523 U.S. 303, 315, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). In addition, judges may exclude evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion. *Crane,* 476 U.S. at 689-90, 106 S.Ct. 2142.

Much, although not all, of the hearsay evidence Gray submitted regarding Dyer was material to the case. While the statements regarding Roundy's state of mind were quite probably not material (and we do not ascribe constitutional error to their exclusion), the statements regarding

Dyer's occupation, threats, and behavior were. This latter evidence provides some basis for believing that Dyer might have killed Roundy. These facts were also vital to Gray's defense, which rested on the premise that someone other than Gray committed the murders. Gray's attorney emphasized this latter point to the trial judge, stating fervently and often that the testimony is "fundamental to our defense" and that "the key to our defense is to discuss the other suspect." At one point, he pleaded, "I just don't know how we can keep from the jury a possible suspect . . . . It's like not telling them the entire story."

The dissent's suggestions to the contrary notwithstanding, this court has repeatedly recognized that "[e]vidence that someone other than the defendant may have committed the crime is *critical* exculpatory evidence that the defendant is entitled to adduce." *Thomas v. Hubbard,* 273 F.3d 1164, 1177 (9th Cir. 2001) (emphasis added). This is true "[e]ven if the defense theory is purely speculative," as "it is the role of the jury to consider the evidence and determine . . . whether it presents legitimate alternative theories for how the crime occurred." *United States v. Vallejo,* 237 F.3d 1008, 1023 (9th Cir. 2001). We conclude that the factual statements excluded were surely material to the defense.

(ii) Trustworthiness

A state sometimes may show that it did not violate a defendant's constitutional rights by affirmatively demonstrating that it excluded the exculpatory evidence because it was unreliable, in accordance with consistently applied standards. For example, the Supreme Court has explained that in *Chambers* it had demanded the admission of

exculpatory evidence because the state "did not demonstrate that the hearsay testimony in that case, which bore assurances of trustworthiness including corroboration by other evidence, would be unreliable." *Rock,* 483 U.S. at 55, 107 S.Ct. 2704 (internal quotations omitted).

Here, Gray's counsel maintained that the testimony was trustworthy, stressing to the trial judge that Roundy's statements had the same situational attributes as the Betty Gray statements admitted as trustworthy – a fearful state of mind, no other way to introduce the statements, adequate detail, and repetition of similar statements to several people. There was no suggestion that Roundy had any motive to fabricate the statements at the time they were made, nor does any such motive suggest itself. The prosecutor did not contend at any point that the defense failed to provide a situational background for demonstrating the trustworthiness of the Roundy statements.

In the face of the arguments that were presented to it, the trial court was very specific about the nature of the proof it needed to determine admissibility – "in fairness, I need to have a name identified to each statement, time, place, and so on . . . so I can look at each statement and make a decision . . . If you'll summarize that for me in a written or oral offer of proof, then I'll take a look at each statement and analyze it as best I can and make a ruling." Gray met this request, submitting written reports on each of the witnesses he wanted to present. The trial court indicated in its written decision that the submissions were satisfactory, and did not ask to assess live witnesses before making its decision. Instead, the trial court, who was closest to the situation, expressed no concern whatever regarding the trustworthiness of Roundy's statements, and reached the merits of the question whether the contents of

the statements were evidence of a material fact. By doing so, the trial court was, it appears, assuming that the statements otherwise met the requisites for admissibility under the catchall hearsay exception.

Moreover, the prosecution *conceded* that Roundy made these statements to which the witnesses were prepared to testify, stating: "I want to make it clear, I'm not suggesting [the witnesses] are making this up . . . . I've talked to these people. And yeah, these statements were made." So, the dissent's reliance on the failure to present *live* testimony as justification for the exclusion of the testimony notwithstanding, there would have been no point in calling the witnesses to testify live before the trial judge. Live testimony is essential for making credibility determinations regarding whether the *witness* is telling the truth. Here, there was no dispute about that.

The Court of Appeals of Idaho nonetheless concluded that, because Gray did not provide an adequate offer of proof to demonstrate the requisite guarantees of trustworthiness, "[t]he record does not support the assertion that the district court abused its discretion in excluding such evidence." 129 Idaho at 795, 932 P.2d at 918. In so ruling, the Idaho appellate court, far from rescuing the arbitrary ruling from constitutional invalidity, only exacerbated the due process violation of Gray's right to present a defense: The state Court of Appeals deferred to a decision about trustworthiness that the trial court decidedly did not make and that would have been inconsistent with the trustworthiness standards the trial court applied to Betty Gray's statements.

The trial court's framework for judging the reliability of the prosecution's hearsay testimony consisted of three

factors: (1) lack of motive to fabricate; (2) spontaneity and consistent repetition; and (3) mental state of declarant. In admitting the prosecution's hearsay statements, however, the trial court did not strictly adhere to this framework. Although the trial court subjected most of the hearsay submitted by the state to this test, in one case it admitted hearsay evidence submitted by the prosecution without evaluating its trustworthiness at all. In other cases, when admitting evidence under Rule 803(24), the trial court did not consistently require repetition; it did not consistently refer to the mental state of the declarant Betty Gray; and, in referring to the motive to fabricate factor, it sometimes referred to just the declarant's motive, and sometimes referred to both the declarant and the witness' motives. Further, the state's analysis of whether the declarant possessed a motive to fabricate consisted simply of the conclusory statement that it appeared that Betty Gray had no motive to fabricate the statements.

The hearsay testimony offered by Gray fared well according to the standards of trustworthiness actually used by the trial court. Roundy appeared to have no more motive to fabricate her statements than did Betty Gray, and Roundy, like Betty Gray, repeated the statements to several different people. Like Betty Gray's, Roundy's factual statements were coupled with expressions of fear, so it appears that Roundy, like Betty Gray, was frightened when she made these statements of fact.

In short, it is simply not true that there was inadequate contextual basis to apply a trustworthiness analysis to Roundy's statement with the same degree of scrutiny and consistency as was applied to Betty Gray's. Rather, the lack-of-trustworthiness basis for exclusion relied upon by the state appellate court, and by the dissent, is an

after-the-fact explanation of a decision that could not be justified on the basis on which it was made. The explanation does not comport with either the record or the trustworthiness standards that the trial court actually applied. As such, the Court of Appeal's [sic] decision approving the exclusion of Roundy's statements is simply another example of the application of arbitrary, asymmetrical, and therefore unconstitutional evidentiary rulings in this case.

We conclude that the state courts committed constitutional error when they arbitrarily refused to admit Roundy's statements implicating Dyer.

3. Substantial and Injurious Effect and Influence

The last issue that we must resolve is whether the trial court's error was harmless under the standard articulated in *Brecht* and *O'Neal v. McAninch,* 513 U.S. 432, 436, 437, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).[13] The *Brecht/O'Neal* standard requires that we first ask

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[13] The warden does not address the *Brecht* question anywhere in his brief, focusing exclusively on the argument that no constitutional error occurred. This circuit has not decided whether the government's failure to address harmlessness in a habeas case constitutes a waiver of that issue, although there is case law from the Seventh Circuit so indicating. *See Holland v. McGinnis,* 963 F.2d 1044, 1057-58 (7th Cir. 1992); *Wilson v. O'Leary,* 895 F.2d 378, 384 (7th Cir. 1990) (Easterbrook, J.) ("Procedural rules apply to the government as well as to defendants."). As we are convinced that the government in this case could not meet the *Brecht* standard had it been addressed, we leave to another day the question whether to enforce a waiver rule on habeas if the government does not argue that an asserted constitutional error was harmless.

whether the trial error had "substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 507 U.S. at 623, 113 S.Ct. 1710 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)); *see also Fisher v. Roe,* 263 F.3d 906, 917 (9th Cir.2001). If we are in "grave doubt" as to the answer to this question – that is, if we do not have a "fair assurance, after pondering all that happened without stripping the erroneous action from the whole" that the error was not harmless – we must grant the habeas petition. *O'Neal,* 513 U.S. at 437, 115 S.Ct. 992 (quoting *Kotteakos,* 328 U.S. at 765, 66 S.Ct. 1239); *Fisher,* 263 F.3d at 917-18.

Our precedent provides some further guidance in applying the imprecise "grave doubt" standard: A 55% likelihood that the error was harmless is "hardly a 'fair assurance' of harmlessness . . . and a 45% chance that the defendant would have been acquitted but for the error certainly seems like a 'grave doubt.'" *United States v. Hitt,* 981 F.2d 422, 425 n. 2 (9th Cir.1992) (quoting *Kotteakos,* 328 U.S. at 765, 66 S.Ct. 1239). In other words, to find the trial error harmless, we must conclude that there was considerably more than a 55% likelihood that the error did not affect the jury's verdict.

Applying these standards, we have no difficulty concluding that the trial court's decision to disallow the evidence regarding Dyer was not harmless. The affirmative evidence against Gray was entirely circumstantial and far from overwhelming, while the evidence against Dyer would have provided the jury with a possible answer to the critical question that arises whenever the defendant's defense is that he did not commit the crime: Then who did?

As to the first point, the nature and strength of the case against Gray: The trial judge's comments, made on three different occasions, are the best guide in evaluating the strength of the state's case. The trial judge first addressed the question on defendant's initial motion for acquittal:

> Frankly, I've been very troubled throughout the case as to the strength of the state's case. It's obvious that someone committed these terrible crimes, but the state's evidence linking the crimes with the defendant has been minimal.
>
> The question I have to decide is whether or not any reasonable jury could find beyond a reasonable doubt that the defendant committed this crime. Admittedly, the evidence is equivocal on that issue.

The judge nonetheless decided to "reserve ruling on that motion and see what the jury decides." When the jury returned a guilty verdict and the motion for acquittal was renewed, the trial judge again summarized his views concerning the strength of the state's case:

> I must admit that throughout the trial, I kept waiting for the State to present conclusive evidence, such as fingerprints, eyewitnesses, that would tie the Defendant to the crime scene . . . and frankly, it did not come in. The evidence was, for the most part, if not entirely, circumstantial evidence. . . . . *[T]he question was and is: Was there sufficient evidence submitted so that the jury could find that this Defendant was the individual who did commit the crimes* . . .
>
> I have given this case a good deal of thought, and it has been a troubling case to me. . . . *Had this*

> *Court been on the jury, I would perhaps have evaluated the evidence differently than other members of the jury. I may have determined the credibility of witnesses differently than the jury did and afforded different weight to the evidence than did the jury in this case and may have drawn different inferences from the evidence . . .*

(emphasis added). Despite his doubts, the trial judge determined that there was sufficient evidence to support the jury's verdict, while opining that "I hope and trust the matter will be appealed so we can have another view as to whether there was sufficient evidence."

Later, in deciding not to impose the death penalty, the trial judge specifically summarized the evidence that led him to have a "lingering or residual doubt as to the defendant's guilt of the crimes for which he has been convicted." Those facts, the judge stated, were:

> (1) The defendant has steadfastly maintained his innocence.
>
> (2) The state was unable to produce a murder weapon.
>
> (3) The state was unable to identify any finger prints of the defendant to link him to the crimes.
>
> (4) The state was unable to produce convincing evidence that the footprints found at the scene of the crime were those of the defendant.
>
> (5) The state was unable to conclusively establish that the hairs found at the scene of the crimes were from the defendant.
>
> (6) Although a witness testified that he saw the defendant in a green International Travelall vehicle at a hospital parking lot approximately 3.5

> miles from the crime scene in the early morning of the day of the crimes, the witness also testified that the man he saw had no facial hair when, in fact, at that time the defendant had a full beard.[14]

Given the paucity in the physical and eyewitness testimony, one can infer that the evidence concerning Gray's anger toward his wife and motive for murdering her – that she was seeking a divorce – was of great importance in the jury's deliberations. Indeed, the substance of the prosecutor's closing argument *began* by focusing on the question of who had the motive and temperament to murder the two women, endeavoring to show that Gray did and the two other possible suspects aside from Dyer did not.[15]

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[14] To these observations could be added: evidence tending to show that the defendant did *not* commit the crime, including his doctor's testimony that he was not physically capable of riding his bicycle as alleged; Mackley's testimony concerning the precise make and color of the vehicle he had seen was not ironclad; and the consideration that there were credibility issues regarding some of the victim's and defendant's relatives who testified against the defendant.

[15] Dyer was not presented to the jury as a possible suspect. Unable to present the Roundy statements concerning him, the defense elected not to elicit from the investigators the fact that Dyer was also a suspect. As Gray's counsel explained in the passage quoted in the dissent (post, at 660-61), without the Roundy statements indicating that Dyer had stalked and threatened to kill one of the victims and had the means to do so, bringing up the fact that he had been investigated as a suspect would have been of no help to the defense.

The dissent is therefore incorrect in suggesting the defense conceded the uselessness of the Dyer evidence. To the contrary, only after trying unsuccessfully three times to introduce the Roundy statements and representing, repeatedly, its great importance did the defense abandon

(Continued on following page)

On the other side of the ledger in deciding whether the *Brecht/O'Neal* standard has been met is the nature of the evidence excluded. As this court has oft recognized, where the evidence against the defendant is purely circumstantial and the pivotal issue is therefore identity, "jurors would naturally ask themselves, 'If the defendant didn't [commit the crime], who did?'" *United States v. Crosby,* 75 F.3d 1343, 1347 (9th Cir.1996) In that context, evidence "support[ing] an alternative theory of how the crime might have been committed" is likely to be "crucial to the defense."[16] *Id.*

Nor is the likely importance of an alternative suspect diminished because Dyer was not the only such suspect. In considering "the impact of the thing done wrong on the minds of other men, not one's own, in the total setting," *Kotteakos,* 328 U.S. at 764, 66 S.Ct. 1239, we are asked to make a judgment about the likely reasoning patterns of others. Looking closely at the record before the jury in order to make that judgment, we note that while there

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its plan to cast suspicion on Dyer, reasoning that to do so with no evidentiary support would be counterproductive.

[16] It is noteworthy that repeatedly, when we have considered the likely impact of a constitutional error, we have taken particular note of the strength of the prosecution's case, recognizing that where that case is not strong, evidentiary and other matters that might otherwise be of little consequence take on potentially dispositive significance. *See, e.g., Sassounian v. Roe,* 230 F.3d 1097, 1111 (9th Cir.2000) ("It cannot be said that the other evidence amassed at trial was so overwhelming that the jury would have reached the same result even if had not considered the [material not properly before it]."); *Eslaminia v. White,* 136 F.3d 1234, 1239 (9th Cir.1998) (error was not harmless in part because the "prosecution case was far from overwhelming"); *Hanna v. Riveland,* 87 F.3d 1034, 1039 (9th Cir.1996) (Wright, J., concurring) (error was not harmless because the prosecution's evidence was not overwhelming).

was evidence that the two other possible suspects, Leavitt and Riley, had a motive to murder, there was no evidence that either had expressly threatened to do so and had taken actions consistent with doing so (stalking, keeping up with Roundy's whereabouts).

Further, and critically, whether it seems to us, or to trial counsel, or to the dissent, that Dyer was a better or worse alternative suspect than the other two is not the question. Rather, we have been admonished that "one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason." *Id.* at 764, 66 S.Ct. 1239. Viewing the record in that light, we conclude that, given the overall weakness of the state's case, had the Dyer evidence been before them, one or more jurors "not . . . generally acting without reason" could have been swayed. A juror might reasonably decide that the Dyer evidence lessened the significance of one of the stronger parts of the case against Gray, his anger at his wife and motive to murder her; having so determined such a juror could thereby be pushed over into harboring a reasonable doubt of Gray's guilt. At least, we harbor a "grave doubt" that no juror "not . . . generally acting without reason" could have so reacted. To our conviction that applying the *Brecht/O'Neal* standard we must grant the habeas petition, the dissent's principal objection – there are others, but we believe we have answered them in the course of explaining our own reasoning – is that Dyer had an alibi, so the jury would *not* have been swayed by the evidence of his threatening behavior. Dyer never testified, whether before the jury or in an offer of proof, and except for an attorney's statement that he claimed to have been in a small town in Oregon at the time of the murders, no

details of the alibi appear in the record. We do not know precisely where he said he was, what he said he was doing, who he was with, whether there is corroboration of the alibi, or whether there is any evidence that his alibi is not true. All we do know is that he provided some sort of evidence that he was out of Idaho at the time of the murders, that the prosecution believed it, and that the defense was aware that if the Roundy statements about Dyer were introduced, it was likely that there would be alibi evidence as well.

From this amorphous state of affairs, the dissent concludes that Dyer had a "valid and unchallenged alibi," *post* at 662, and that the trial court's exclusion of the Roundy statements concerning Dyer was therefore harmless. The truth is that we have no idea – and more importantly, the jury, on the present record, had no idea – whether or not Dyer's alibi would have been "unchallenged" or whether it was "valid." For all we know, Dyer might have presented his alibi only to be decisively impeached, Perry Mason-style, on cross examination. That possibility is not particularly far-fetched: Dyer not only denied being in Oregon but also "denied knowing much about Reeda Roundy, not seeing her in a long time, certainly not harassing her, threatening her, following her, or anything of that sort." Had four witnesses testified to Roundy's statements to the contrary, it is possible that the jury would not have regarded Dyer as a truthful person whose representations regarding his whereabouts on the night of the murder were to be believed.

This last scenario is, of course, an exercise in speculation. But so to recognize is only to highlight that embarking upon speculation concerning how the trial would have unwound had the evidence excluded been admitted is

inconsistent with our role in determining whether there was *Brecht/O'Neal* error (or any other version of harmless error rule, for that matter).

Brecht and its forebear, *Kotteakos,* make clear that a trial error is considered harmless only if the *actual* jury in the case would have reached the same verdict absent the error. "The test under *Kotteakos* is whether the error 'had substantial and injurious effect or influence *in determining the jury's verdict.*'" *Brecht,* 507 U.S. at 637, 113 S.Ct. 1710 (emphasis added) (quoting *Kotteakos,* 328 U.S. at 776, 66 S.Ct. 1239); *see also id.* at 629, 113 S.Ct. 1710 (trial error "is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed *in the context of other evidence presented* in order to determine [the effect it had on the trial].'") (alterations in original) (quoting *Arizona v. Fulminante,* 499 U.S. 279, 307-08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)); *Kotteakos,* 328 U.S. at 764, 66 S.Ct. 1239 (judicial analysis of impact of error must take place "in relation to all else *that happened*") (emphasis added). The emphasis, in other words, must be on what *actually occurred* in the courtroom before the jury.

To go beyond the record before the court in deciding the likely impact of excluded evidence on the jury would, indeed, implicate the defendant's Sixth Amendment right to a trial by jury in the guise of determining harmlessness. As Justice Scalia explained in *Sullivan v. Louisiana,* 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993):

> Consistent with the jury-trial guarantee, the question . . . is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. Harmless-error review looks, we have said, to the

> basis on which the jury *actually rested* its verdict. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.

(alterations in original) (internal quotations and citations omitted).

Our precedent likewise dictates that we must not construct a hypothetical trial, but instead consider the effect of the trial error on the actual jury's actual verdict. In *Hanna,* 87 F.3d at 1039, we stated that: "the proper harmless error inquiry in habeas proceedings is for the judge to ask, *based on the record's facts,* whether he or she believes 'that the error substantially influenced the jury's decision?'" (emphasis added). We are not aware of any case to the contrary – that is, a case in which excluded evidence was adjudged to have been harmless because of possible additional evidence that was *not* before the jury (or for that matter, before the judge, except in broad outline), and the dissent does not cite any.

In sum, the dissent's reliance upon an alibi that might have been admitted but was not, and as to which we know almost nothing, cannot affect the *Brecht/O'Neal* analysis. We therefore are not dissuaded from our conclusion that on the decisive question, we cannot say with any acceptable level of confidence that the evidence excluded, if admitted, could not have had a substantial influence on the jury's deliberations.

III. Conclusion

Because the trial court applied Idaho's rules of evidence in two very different ways depending on whether the prosecution or the defense presented the evidence, it violated Gray's constitutional rights. This error was not harmless. Therefore, we REVERSE the trial court's grant of summary judgment for the warden and REMAND to the district court with instructions to grant the writ, requiring that the state of Idaho to [sic] bring Gray to trial again within a reasonable amount of time or release him from custody.

TROTT, Circuit Judge (Concurring in part, dissenting in part):

In this case, my colleagues order a new trial for a man convicted of murdering his former wife and a friend. In my judgment, their ground for this errant order is nothing more than that he was not allowed to introduce in his defense stale, pointless, and untrustworthy hearsay evidence excluded by the trial court and Idaho's Court of Appeals as inadmissable, irrelevant, and immaterial. Thus, although I agree with much of my colleagues' otherwise excellent opinion, I respectfully dissent on the dispositive issue.

I

Hearsay

My colleagues conclude that the trial judge and Idaho's appellate courts were guilty of the asymmetrical application of state law evidentiary standards with respect to "parallel evidence." I respectfully disagree.

1.

Betty Gray's Statements

The trial court's decision *to allow* some of victim Betty Gray's out-of-court statements under Idaho's residual hearsay exception did not violate William Gray's Sixth Amendment right to confront witnesses. *See* U.S. Const. amend. VI; Idaho R. Evid. 803(24). In this respect, I agree with my colleagues. When a declarant is unavailable to testify, the Confrontation Clause countenances hearsay only if it demonstrates adequate indicia of reliability either by (1) falling within a firmly rooted hearsay exception; or (2) bearing particularized guarantees of trustworthiness. *See e.g., Idaho v. Wright,* 497 U.S. 805, 814, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); *Ohio v. Roberts,* 448 U.S. 56, 62-63, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); *California v. Green,* 399 U.S. 149, 155-56, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

Idaho's residual hearsay exception, under which the challenged statements were admitted, is not a firmly rooted hearsay exception. *Wright,* 497 U.S. at 817, 110 S.Ct. 3139. However, Betty's statements bore particularized guarantees of trustworthiness. The government presented the live testimony of Joanne Buccola as to the situational background of Betty's statements. Buccola was subjected to intense cross-examination by Gray's counsel. She testified that Betty spontaneously uttered the statements, repeated them several times, and was in an excited state when she made them. As the federal district court correctly observed, the trial court engaged in precisely the type of careful process that the Supreme Court suggested was necessary to protect the Defendant's rights under the Confrontation Clause. *Wright,* 497 U.S. at 814-16, 110 S.Ct. 3139. Moreover, the trial court analyzed the factors

which tend to show that a statement bears particularized guarantees of trustworthiness, including spontaneity, consistent repetition, state of mind, and lack of motive to fabricate. *Id.* Furthermore, the Court of Appeals of Idaho reviewed this issue as a matter of the State's rules regarding hearsay, and it concluded that the trial court's decision had a basis in State law and was not an abuse of discretion. *State v. Gray,* 129 Idaho 784, 932 P.2d 907 (Ct.App.1997).

2.

Reeda Roundy's Statements

The trial court's decision *to preclude* Gray from introducing certain out-of-court statements made by Reeda Roundy about an alternative suspect did not violate Gray's constitutional rights, and it was fully consonant with Idaho's evidentiary rules regarding hearsay. In this respect, I disagree with my colleagues. To begin with, the Court of Appeals of Idaho concluded on direct review after a full analysis of the issue that *under State law,* "Roundy's statements regarding her concern about her ex-boyfriend are inadmissible because they *fail to meet the test for relevancy.*" 932 P.2d at 918 (emphasis added). In the main, a victim's fear of an individual in Idaho is relevant only in certain circumstances, and none of them was present in this case; and "Roundy's *fear* of a third person does not establish or disprove Gray's guilt." *Id.* The Court of Appeals then analyzed Dyer's allegedly threatening behavior under its residual hearsay exception, Rule 803(24) and concluded here also that this evidence was properly excluded. Why? Because it bore "no guarantees of trustworthiness:"

> The district court also considered I.R.E. 803(24) as an alternative theory of admissibility. As discussed earlier, I.R.E. 803(24) *requires that the trustworthiness of the statement must be shown from the totality of the circumstances that surround the making of the statement. Wright,* 497 U.S. at 819, 110 S.Ct. 3139. In seeking the admission of the evidence at trial, Gray's counsel presented to the district court the content of the statements. *Defense counsel did not provide an offer of proof which indicated the circumstances surrounding Roundy's declarations.* The witnesses who allegedly heard Roudy's [sic] statements were not called upon to provide a situational background for the statements. Hence, *there is no record of the circumstances surrounding the statements.* We cannot say that Roundy's factual statements regarding her ex-boyfriend's behavior and occupation bore the circumstantial guarantees of trustworthiness which would have justified admission under I.R.E. 803(24). The record does not support the assertion that the district court abused its discretion in excluding such evidence.

State v. Gray, 129 Idaho at 795, 932 P.2d at 918 (emphasis added).

My colleagues' lengthy protestations notwithstanding, we have a loud, clear, and unambiguous statement from Idaho's Court of Appeals that this disputed piece of evidence lacked the guarantees of trustworthiness. This certainly differentiates it from the evidence mistakenly used by Judge Berzon as a comparison.

"It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S.Ct.

475, 116 L.Ed.2d 385 (1991). Therefore, even if I were to agree with Gray that the trial judge erred as a matter of Idaho evidentiary law by not admitting Roundy's statements – which I do not – we would be forbidden from granting Gray's federal habeas petition, unless his resulting "conviction violated the Constitution, laws, or treaties of the United States." *Id.*

Recognizing our habeas limitations, Gray attempts to force a constitutional slipper onto his state evidentiary claim by arguing that the trial court's decision not to allow him to introduce Roundy's irrelevant out-of-court statements violated his due process right to present a defense. This is a strained refrain we hear far too often. Gray claims that the trial court arbitrarily applied the state's residual hearsay exception, Idaho R. Evid. 803(24), because it allowed the state to introduce Betty's statements about why she feared her husband, but precluded Gray from introducing Reeda's statements about why she feared a particular alternative suspect. This application, says Gray, deprived him of the opportunity to put on a defense. *See e.g., Rock v. Arkansas,* 483 U.S. 44, 54, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Washington v. Texas,* 388 U.S. 14, 22, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Although the trial court came to different conclusions regarding the two women's somewhat similar statements, I am satisfied that a substantial distinction between the parties' offers of proof as articulated clearly by the Idaho Court of Appeals demonstrates that the trial court did not act arbitrarily. The majority is mistaken in its claim that the two victims' hearsay statements were "parallel," as

Judge Wood's and the Court of Appeals' decisions demonstrate. Thus, no asymmetrical treatment amounting to a constitutional violation occurred.

As part of its offer of proof, the state presented a witness, Joanne Buccola, who testified in person out of the presence of the jury about the situational background of Betty's statements. Buccola described for the trial judge Betty's harried state-of-mind, her consistent repetition of the statements, and the fact that Betty spontaneously uttered the statements, not in response to any leading questions. The trial judge specifically relied on Buccola's demeanor and detailed testimony in concluding that Betty's out-of-court statements bore sufficient particularized guarantees of trustworthiness to be admitted under the residual hearsay exception. I underscore here that the trial judge observed this witness on the stand, listened to her testimony, and made a determination of relevancy and admissibility that is entitled to deference. More about relevance later.

Gray's offer of proof, in contrast, included *no* witness to provide a situational background for Roundy's statements. Indeed, Gray never asked the trial court if he could call such a witness out of the presence of the jury to provide such a background. Instead, Gray's counsel relied wholly on his own oral proffer as to what the witnesses would say to if allowed to testify. At one point, Gray's trial counsel stated for the record that he was requesting "the opportunity to call these witnesses." During oral argument, Gray's appellate counsel forthrightly admitted that trial counsel's request referred to calling these witnesses to testify *in front of the jury,* not to calling them in front of the judge to provide the situational background of the

statements. The record supports appellate counsel's characterization of the events.

Simply because the trial court precluded Reeda's statements and admitted Betty's statements does not demonstrate that the trial court violated Gray's constitutional rights, far from it. Gray's opportunity to lay a proper foundation was in the trial court. He did not avail himself of that opportunity, and it is not for the federal courts to remedy his failure. The notable qualitative difference between the government's offer of proof and Gray's offer of proof as well as the manifest legal differences between the two submissions satisfy me that the trial court did not act arbitrarily so as to deprive Gray of his due process right to present a defense. As Judge Wood correctly noted in response to Gray's attempt to use this evidence, the right to defend does *not* include the right to do so with inadmissible evidence. This is the short answer to Gray's meritless claim that he was not allowed to defend himself.

II

Substantial and Injurious Effect or Influence

Even were I to start from the flawed proposition that Judge Berzon's constitutional analysis regarding the exclusion of Reeda Roundy's alleged statements is correct, which respectfully I do not, I conclude nevertheless that Judge Wood's decision to preclude the disputed statements absolutely did not have a "substantial and injurious effect or influence" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Here, I have no doubt whatsoever about this conclusion. When one examines the excluded evidence and asks what impact it would have had on the jury, the answer in my

view is at best "not much." Among other problems, one needs to consider here what the *whole* package would have been had the evidence been admitted and then countered as promised by the prosecution. It is not enough to examine the disputed evidence divorced from its context and the rest of the record.

The police had investigated Dyer and concluded that he had a valid alibi. This neutralizing evidence of Dyer's alibi would have been admissible, as recognized in *Kyles v. Whitley,* 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), to demonstrate that the investigation conducted by the police was comprehensive and not shoddy. Gray's counsel *admitted* at trial that if he introduced the allegedly inculpatory evidence, the prosecution would call the officers to testify about Dyer's alibi. E.R. 120, p. 259. Counsel did not attack Dyer's alibi or suggest that it was a fraud. In fact, Gray's counsel referred to Dyer as just a "suspect" and even admitted that Dyer was not the best "alternative suspect." Indeed, he argued that other suspects were more likely than Dyer, and that he just wanted the jurors to have a "complete picture" of the situation. According to counsel, Dyer was just the *third* on the list of "possibles." Suspect # 1 was Betty Gray's current lover, Leavitt, who discovered the bodies and called the police. Suspect # 2 was Roundy's current lover, Hugh Riley.

To demonstrate how flimsy the excluded Dyer evidence was, one need only to look to Gray's own counsel's description of it and the irrelevant purpose for which it was being offered to the trial court:

> MR. RADIN: Thank you. Judge, our defense, the key to our defense is to discuss the other suspects. We haven't made this up, Judge. They were suspects – J.W. Dier [sic], LeRoy Leavitt,

and Hugh Riley – were all suspects in the minds of the police officers.

They're all investigated. The alibis of all three were checked. So it's important for us, and I hope you understand, if I can express any one thing in this morning's hearing, is that the key to our defense is to at least discuss with the jury the other suspects.

They can draw their own conclusion as to each one. But we have to at least make the whole picture known to them.

THE COURT: But you can't do it through inadmissible evidence.

MR. RADIN: Let me get to that. The testimony regarding J.W. Dier is very important. We're asking the court to let it in under Rule 80324(sic). That's the catchall.

. . .

MR. RADIN: It's part of the story. Dier is one of those individuals. His name was brought to Mr. Rodriguez's attention by Vada Roberts, Hugh Riley, Ruth Ann Roundy, and Clayton Roundy.

THE COURT: What's Dier's full name?

MR. RADIN: J.W. Dier.

MR. MULLIGAN: James.

THE COURT: All right.

MR. RADIN: As a result of what these four witness said, Mr. Rodriguez in his department looked into Mr. Dier. *They checked his alibi. They spoke to him directly. In fact, they tape-recorded that conversation.*

So we intend to ask Mr. Rodriguez, with your permission, whether there were other possible suspects. *Now, he may say, We eliminated him. And why? And that would be very proper for Mr. Kane [the prosecutor] to bring out.*

But we would like to ask Mr. Rodriguez if there were other possible suspects and *what they did or didn't do to investigate those other suspects.*

Dier was one of them. We have not made his name up. It came forward by the police and by these other individuals.

Mr. McCandless, while he's on the stand, he was the one who actually checked the alibi. He's the one who actually interviewed Mr. Riley.

So I would like to ask him: As part of your investigation did you check into any other possible suspects including Mr. Dier?

Yes.

What did you do?

Well, I did check on his alibi.

I don't want to get into hearsay, but I at least want to bring out that he was a possible suspect and the reasons why.

If you want to reconsider your other decision [regarding Betty Gray's statements], that's, of course, always up to you. But the point being that I just don't know how we can keep from the jury a possible suspect that was investigated by the sheriff's office itself. It's like not telling them the entire story.

If you look at Vada Roberts, if I could encourage you, I'm sure you'll read all of them, but Vada

> Roberts is very specific. It occurred just nine short months prior to her death. It's very detailed as to Reeda Round's concerns and the reasons for her concerns.
>
> And like I said, he [the prosecutor] can bring out on cross the length of time. He can bring out that Mr. Dier was investigated. *He did have an alibi.*
>
> They can bring all of this out. *We're not saying that he's the best suspect or that we can show that he committed the crime.*
>
> But the *jury is entitled to know that that* [sic] *there were other suspects, that they were investigated by the sheriff's office, and why they were investigated.*
>
> (Emphasis added.) [May 12 & 14 hearings]

To fill out this picture, here is part of the prosecutor's response to Gray's offer of proof.

> MR. KANE: Finally, if I could make an offer of proof, we are prepared to prove and would prove that Mr. Dier was in a different state at the time the killings went down. I don't think [the evidence] is relevant for that reason. [June 2, 1993]

I note here that Judge Wood's pre-trial hearsay relevancy ruling left the door open for Gray's counsel to pursue his attempt to show that Dyer was one of the other suspects. However, for tactical reasons, the defense did not take advantage of this opportunity. In explaining why during a motion for a new trial, the lack of probative value of this evidence again becomes apparent. I note also that Gray's counsel had the opportunity to call Dyer himself to the stand but decided not to do so. This is yet another

reason that undercuts my colleagues [sic] claim that Gray was somehow not allowed to defend himself.

> MR. RADIN: Now, I am fully aware and the court did tell the defense through counsel that we could mention the name of Mr. Dyer. We could have asked Detective Rodriguez if such a suspect existed, and expecting that he would have been honest, he would have said, "Yes, we did have a suspect. We were ware [sic] of Mr. Dyer. His name did come up. We checked it out, and eventually we discounted him as a suspect."
>
> But as defense strategy, Judge, we were obviously trying to convince the jury that aside from Mr. Gray there were other suspects. There's Mr. Hugh Riley, who was the lover of Mrs. Roundy, and there was Mr. LeRoy Leavitt, who was the lover of Mrs. Gray. And we had some testimony. Those gentlemen were here to testify. To bring in Dyer and simply have him deny it, or have Rodriguez simply come in and say, "Yeah this guy existed. We checked him out, but it didn't come to anything," would have been in effect to have created a vacuum for the jury of facts, and it would have been like just kind of trying to throw out another little tidbit, and I think it would have taken away the effective aspect of our defense, well, you'd better take a hard look at LeRoy Leavitt, and you'd better take a hard look at Hugh Riley as alternate suspects.
>
> But just to mention Dyer's name, I feel, would have done us no good. It would have been presented in a vacuum.
>
> [Aug. 10, 1993]

The Dyer evidence was in my opinion a grasping attempt based on flimsy evidence to make something out of nothing. The idea that "Dyer did it" was rank speculation, clearly excludable as not probative. There is *no* other direct or circumstantial evidence adequately supporting or corroborating this view, to the contrary. Certainly no disrespect meant to trial counsel, but it was flak hearsay evidence. Shoot it into the air and maybe we'll get lucky and something will hit it. Judge Wood correctly pointed out the difficulty of deciphering one person's intentions and behavior, Dyer's, from the statements of another, Roundy. Judge Wood was correct. On the other hand, the record was *loaded* with evidence that Betty Gray, not Reeda Roundy was the target of this killing.

Let me put it this way.

Of what relevance *at the trial* is the fact that X *was* a suspect, *until* it was discovered on investigation that he was dead at the time of the crime and could not have committed it? Of what relevance *at the trial* is the fact that X *was* a suspect, *until* it was discovered that he was in jail at the time of the murder? Similarly, of what relevance is it at *this* trial that X *was* a suspect, *until* it was discovered that he was out of state at the time of the murder? The obvious answer is that the fact that X *was* a suspect is not relevant because it proves nothing for the defense. He may have been a suspect, but he was cleared. It follows as night the day that having been eliminated as the murderer, *nothing* he said nine months earlier could be used to suggest that he might have committed the crime. So of what value under these circumstances was either the fact that he *was* a suspect or that nine months earlier, he said anything nasty about one of the victims? All *this* evidence

does by *eliminating* one of the suspects is *increase* the probability that Gray was guilty.

Given these circumstances, because Dyer had a confirmed alibi which Gray's counsel acknowledged and did not dispute, any inference from the excluded statements that Dyer may have killed the women would have been absolutely misleading. Misleading evidence is not admissible any where in our system. If this is true, then the simple fact as pushed by Gray's attorney that Dyer was at one time a suspect, is clearly irrelevant. What does it prove? How does the fact that another suspect existed but that he was cleared help the defense. If anything, it *hurts* the defense.

The SODDIT defense (some-other-dude-did-it), of which this is a weak variant, in my experience of 23 years in the criminal courts only works when the evidence pointing to that dude is plausible. Here, it simply wasn't. In fact, Gray's counsel was obviously aware that the evidence was useless to show that Dyer was the killer. This explains why it was only offered to show "other suspects." Measured against the inculpatory eyewitness testimony and the other evidence of Gray's guilt, I believe this exclusion was resoundingly harmless. The jury was *not* going to believe that Dyer was the killer, the evidence that at one time he was a "suspect," but out-of-state when the murder happened, was irrelevant; and the excluded evidence viewed in the light of the rest of the case was not sufficient to raise a *reasonable* doubt based on the pointless claim that these were "other suspects." Given the verdict, the jury obviously credited Mackley's testimony putting Gray, not Dyer, in a position to kill his former wife and her friend.

In fact, a defense attorney can seriously *damage* his case when he suggests or insinuates or offers to prove without substantial evidence that someone other than the defendant committed the crime. When the prosecution then proves that the surrogate suspect is innocent, which it is certainly entitled to do, the loud backfiring that occurs tears a hole in the defense's credibility and strengthens the prosecution's case. This is what we have here – a desperate albeit understandable attempt by the defense to muddy the waters. This case may have been close, but the excluded evidence, *including* "the whole picture" of which it was necessarily a part, would not have made it any closer. In fact, it very well could have made it better for the State and *worse* for Gray.

If counsel had succeeded in convincing the judge to admit this evidence and then watched the prosecution demolish Dyer as a suspect, I'm sure it would have been now called blatant *Strickland* error on the ground that it hurt his client's defense. Opening this door allows the police to show what a thorough job they did, and that they eliminated other suspects. This hardly helps the defense. This concern is not as far-fetched as it might seem. Appellate counsel during the direct appeal to the Idaho courts accused trial counsel of numerous counts of constitutionally defective representation. Mr. Radin has already been put on trial. Moreover, in *Phillips v. Woodford,* 267 F.3d 966 (9th Cir.2001), we recently concluded that a defense attorney had provided ineffective assistance of counsel by *introducing* evidence of an alibi for his client, evidence suggested and vouched for by the client, under circumstances where the attorney should have known – given the rest of the evidence – that the alibi defense was "hopeless."

Because the attorney harmed the defendant with a defective claim of alibi, we granted the defendant a new trial. It is not a great stretch to move from *Phillips* to this case where it appears that the defense attorney was attempting to use a SODDIT defense that was certain to fail because of a valid and unchallenged alibi. Defense lawyers in this circuit appear now to be *Strickland* damned if they don't, but also damned if they do.

III

Conclusion

Our circuit tends doggedly to repeat its mistakes in habeas cases even though we have been corrected many times by the Supreme Court. Indeed, it is not beyond the pale to say that we have been mildly castigated for abusing our habeas authority. Here is what the Court told us in 1991 in *Estelle v. McGuire:*

> We first consider whether the admission of the prior injury evidence justified habeas relief. In ruling that McGuire's due process rights were violated by the admission of the evidence, the Court of Appeals relied in part on its conclusion that the evidence was "incorrectly admitted . . . pursuant to California law." *Id.*, [*McGuire v. Estelle,* 902 F.2d 749] at 754 [(9th Cir.1990)]. Such an inquiry, however, is no part of a federal court's habeas review of a state conviction. We have stated many times that "federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers,* 497 U.S. 764, 780, 110 S.Ct. 3092, 111 L.Ed.2d 606, (1990); see also *Pulley v. Harris,* 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Today, we reemphasize that it is not the province of a federal habeas court to

> reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2241; *Rose v. Hodges,* 423 U.S. 19, 21 96 S.Ct. 175, 177, 46 L.Ed.2d 162 (1975) (*per curiam*). *[N.2]*

Id. 112 S.Ct. at 479-480 (footnote in original).

One can hardly miss the implications of the Court's references to *Lewis v. Jeffers* and to *Pulley v. Harris.* In those cases, we exceeded our authority and were reversed. Footnote 2 from this passage in *Estelle* is also instructive about another of our unsuccessful cases. It references *Blair v. McCarthy,* 881 F.2d 602 (9th Cir.1989), *cert. granted,* 498 U.S. 807, 111 S.Ct. 39, 112 L.Ed.2d 16, *vacated as moot and remanded,* 498 U.S. 954, 111 S.Ct. 377, 112 L.Ed.2d 391 (1990) and says about that case, that "the court of Appeals based its grant of habeas relief solely on a ground of state law that prejudged the defendant. As our discussion above makes clear, such state-law violations provide no basis for federal habeas relief." 881 F.2d at 603-604.

We attempt to avoid this clear constitutional restriction, however, by claiming that the state-law violation we falsely perceive is so serious that it violates due process, and we do so even as here, when the state courts have definitively examined the issue under state law and declared that no state law violation or lapse has occurred. With all respect to my colleagues, not even legal legerdemain can accomplish such a result. To pull a rabbit out of a hat, the hat must contain a rabbit before the trick starts. Here, Gray's hat *has no rabbit,* but we pull one out of it at the State's unwarranted expense nevertheless. Dyer was

not in there. With all respect to my colleagues I believe we have far exceeded our authority in ordering a new trial in this case based on the exclusion of irrelevant hearsay. In my respectful judgment, not only have we mistreated Idaho in refusing to apply the relevant habeas test and taking liberties with its handling of its evidentiary rules, but we have accomplished exactly what the Supreme Court warned against in *Brecht* when it noted that unnecessarily retrying old cases "imposes significant 'social costs' that, among other things, frustrate society's interest in the prompt administration of justice." *Id.*, 507 U.S. at 637, 113 S.Ct. 1710. Our order here simply orders a new trial at which it will be proved that Dyer could not have committed the murder, thus tightening the noose around Gray.

Thus, although I concur in the excellent remainder of Judge Berzon's opinion, I respectfully dissent from the part that results in the granting of this petition.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

WILLIAM L. GRAY, Petitioner, v. JOSEPH KLAUSER, WARDEN, IDAHO STATE CORRECTIONAL INSTITUTION, Respondent.	Civ. No. 98-0387-S-BLW MEMORANDUM DECISION AND ORDER

1. Introduction

This matter comes before the Court on cross motions for summary judgment. The Court has considered the briefs of counsel, the voluminous record provided to the Court, as well as the pertinent case law, and now issues the following decision.[1]

2. Facts[2]

In the early morning hours of July 24, 1989, Petitioner's wife, Betty Gray, and her friend Reeda Roundy,

[1] The Court notes that Petitioner has filed a Motion to Exceed the Page Limit for Memorandum in Support of Motion for Summary Judgment (Docket No. 19). As this is a case of some magnitude, the Court will grant the motion and consider the overlength brief in resolving the issues raised in the Petition.

[2] The parties agree that there are no material facts in dispute. Therefore, this account of the facts is gleaned from the Idaho Court of Appeals' opinion on Petitioner's direct appeal. *State v. Gray,* 129 Idaho 784, 790-91, 932 P.2d 907, 913-14 (Ct.App. 1997).

were killed in Roundy's house in Idaho Falls, Idaho. In 1992, Petitioner was indicted for two counts of first-degree murder and one count of first-degree burglary.

On May 11, 1993, the case went to trial before a jury. The prosecution's theory of the case was that Petitioner killed Betty because he had learned that she was having an affair. The prosecution further alleged that, to prevent his motive for murder from being discovered, Petitioner had asked Betty not to discuss their impending divorce with their family and friends. The prosecution contended that Gray had recently purchased an International Travelall vehicle, which he registered in someone else's name, so as to avoid the use of his usual vehicle and conceal his presence at the scene of the crime. The prosecution attempted to prove that Petitioner drove the Travelall from his home in Jackson Hole, Wyoming, to the Eastern Idaho Medical Center in Idaho Falls on an evening when Betty was staying overnight with Roundy. Petitioner then rode a bicycle approximately three and a half miles to Roundy's house. The prosecution's theory of the case was that Petitioner killed both women and arranged the scene in the house to appear as though the killings were committed as part of a satanic ritual. After the killings, Petitioner then rode the bicycle back to the hospital, placed the bicycle back in the Travelall, and drove back to Jackson Hole.

The defense alleged that Petitioner was unaware at the time of Betty's death that she was having an affair. Petitioner contended that he could not have ridden a bicycle for seven miles due to his poor health. He also asserted that one of three other men associated with the two victims was responsible for the murders.

Following trial, the jury returned a verdict of guilty on two counts of first-degree murder and one count of first-degree burglary, with each of the crimes being enhanced for use of a firearm. Petitioner was sentenced to two determinate life sentences for the first-degree [murder] charges, and a ten year sentence for the first-degree burglary charge. Petitioner appealed his conviction and sentence to the Idaho Court of Appeals, which affirmed the trial court. *State v. Gray,* 129 Idaho 784, 932 P.2d 907 (Ct. App. 1997). Petitioner then filed a petition for review with the Idaho Supreme Court, which was denied on March 19, 1997. Petitioner thereafter filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied on October 10, 1997.

On October 1, 1998, Petitioner filed his First Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. On April 20, 1999, this court issued an Order in which it found that the petition was timely filed and that liberally construed, the petition stated cognizable claims under § 2254. Therefore, the Court required Respondent to file a response, which it did on May 20, 1999. On July 27, 1999, both Petitioner and Respondent filed the instant summary judgment motions.

3. Standard of Review

Under 28 U.S.C. § 2254(e), as amended by the Anti-terrorism and Effective Death Penalty Act of 1996, a state court's determination of a factual issue "shall be presumed to be correct." The amended 2254(e), however, goes further than the former 2254(d), and states that the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

In addition, 2254(d) now sets forth the deference to be afforded the state's legal determinations: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits" unless this Court finds that the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id., at § 2254(d). When reviewing a state court determination in a habeas proceeding, the Court generally asks "whether the error had substantial and injurious effect of influence in determining the jury's verdict." *Bains v. Cambra,* 204 F.3d 964, 977 (9th Cir. 2000), citing *Brecht v. Abrahamson,* 507 U.S. 619, 636-38 (1993).

4. Summary Judgment Standard Applicable to Habeas Corpus Actions

In determining the validity of a motion for summary judgment, the Court must determine whether, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c) (1993). The party moving for summary

judgment has the burden of proving the absence of any genuine issue of material fact that would allow a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

The substantive law of federal habeas corpus defines those facts which are material to the issuance of the writ. Under 28 U.S.C. § 2241(c), this Court may grant a petition for federal habeas corpus relief where the Petitioner alleges and proves facts showing that he is in custody in violation of the Constitution, laws and treaties of the United States. Where a prisoner has been afforded a hearing in state court on the merits of his constitutional claims, however, the federal habeas corpus statutes provide that the written findings of fact reached by the state court, whether trial or appellate, "shall be presumed to be correct." 28 U.S.C. § 2254(e). However, purely legal questions are to be reviewed *de novo*. *LaJoie v. Thompson*, 201 F.3d 1166, 1170 (9th Cir. 2000).

Both Petitioner and Respondent agree that there are no material issues of fact in dispute which would preclude entry of summary judgment. Therefore, the Court finds the case ripe for disposition on summary judgment.

5. Discussion

Petitioner raises four issues in his application for writ of habeas corpus. The Court will address each issue in turn.

1. Suppression of Statements Made by Reeda Roundy

Petitioner contends that he was denied his due process right to a fair opportunity to defend against the State's accusations when the trial court refused to admit evidence

of statements made by victim Reeda Roundy about an alternative suspect, J.W. Dyer. Petitioner attempted to introduce evidence that Dyer, a mercenary and former lover of Roundy's, had stalked and threatened to kill her. Roundy had allegedly told four separate individuals of Dyer's conduct and threats: her friend and co-worker Vada Roberts; her lover Houston Riley; her son Clayton Roundy; and her daughter Ruth Ann Roundy. Roundy allegedly told all four individuals that Dyer should be considered a suspect if anything should happen to her.

At a pretrial hearing on motions in limine, Petitioner argued that the hearsay statements were admissible under the state of mind exception, set forth in I.R.E. 803(3) and under the residual or catchall exception set forth in I.R.E. 803(24). The trial court denied their admission, on the grounds that Roundy's fear of a person not related to the prosecution was irrelevant, and that Roundy's statements were inadmissible hearsay. The Idaho Court of Appeals affirmed the trial court. On the issue of relevance, the Court of Appeals stated:

> A victim's fear of an individual is relevant in only limited circumstances. Purposes for which such statements are relevant include: establishment of a motive for the crime charged; rebuttal of a claim of self-defense, suicide, or accidental death by illustrating the victim's propensity for or away from the relevant tendencies; or to dispel the argument that the victim and the accused had a good relationship. In each instance, the state of mind of the victim was integral in understanding a significant issue in the case. Here, the individual whose state of mind was relevant to Gray's defense was not Roundy, but rather her ex-boyfriend. Roundy's statements that she

> feared her ex-boyfriend do not show that he possessed an intent to harm her. Therefore, the statement does not bear on a material issue at trial in the same manner as those statements of fear which have been found to be admissible as descriptions of an existing mental state. Roundy's fear of a third person does not establish or disprove Gray's guilt. Roundy's statements regarding her concern about her ex-boyfriend are inadmissible because they fail to meet the test for relevancy.

State v. Gray, 129 Idaho at 794-95, 932 P.2d at 917-18 (citations omitted). The Court agrees with the Court of Appeals' assessment that, under the Idaho Rules of Evidence, Roundy's fears of Dyer were irrelevant.

As noted by both the trial and appellate courts, the proffered statements were also hearsay under Idaho law. They were statements made by an out-of-court declarant, i.e, Reeda Roundy who is now deceased, which were offered to prove the truth of the matter asserted, i.e., that she feared Dyer and believed him to be a mercenary who had threatened to kill her. Petitioner sought admission of the statements under I.R.E. 803(3) and 803(24).[3]

Petitioner contends that the trial court should have admitted Roundy's statements because they fall within the state of mind exception to the hearsay rule. The difficulty

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[3] Effective December 1, 1997, Rule 803(24) of the Federal Rules of Evidence was combined with Rule 804(b)(5) and transferred to a new Rule 807. However, this change has not been adopted by the Idaho Supreme Court, and Idaho's iteration of the residual exception is still contained in Rule 803(24).

with that argument is that the exception, by its terms, only applies to expressions of the "*declarant's* then existing state of mind, emotion, sensation, or physical condition." Thus, the exception would permit the admission of Roundy's statements concerning her own state of mind. However, as indicated above, the fact that Roundy was afraid of Dyer was not relevant to the prosecution of the Petitioner.

Although Roundy's state of mind was not relevant, the reasons for her fear, i.e., that Dyer had threatened her, was a mercenary, and was stalking her, would seem relevant to the Petitioner's defense since they tended to indicate that another person had the motive, opportunity, and ability to commit the murders. However, Roundy's statements as to the reasons for her fear do not fall within Idaho's state of mind exception to the hearsay rule. *State v. Rosencrantz,* 110 Idaho 124, 128, 714 P.2d 93, 97 (Ct. App. 1986) ("a victim's out of court expression of fear may be used to show his or her state of mind but not to prove the underlying facts upon which the fear is based. Those underlying facts must be established by other common non-hearsay evidence"). *See also Bains v. Cambra,* ___ F.3d ___, 2000 WL 232270 (9th Cir., Mar. 2, 2000). The reasons for her fear would have to be established by other non-hearsay evidence. In short, Roundy's declaration of her fear of Dyer falls within the state of mind exception to the hearsay rule, but is not relevant, while the stated reasons for that fear are relevant, but were properly excludable as hearsay since they went beyond an expression of the declarant's state of mind.

The Petitioner also contends that Roundy's statements should have been admitted at trial under the residual exception to the hearsay rule. Hearsay evidence

sought to be admitted under I.R.E. 803(24) must have circumstantial guarantees of trustworthiness equivalent to the listed exceptions to the hearsay rule. *State v. Ransom,* 124 Idaho 703, 864 P.2d 149 (1993). It is apparent from an examination of the record that Petitioner did not explain to the trial court the circumstances surrounding Roundy's statements. Rather, he now argues that Roundy's statements provided substantial guarantees of trustworthiness, because she feared enough for her safety to confide her fears in the people closest to her. However, based on the record presented, the trial and appellate courts found insufficient guarantees of trustworthiness in the statements, and excluded them. This Court is faced with the same record, and cannot find that the state courts improperly excluded the evidence under Idaho's residual exception to the hearsay rule.

Moreover, even if the Idaho Rules of Evidence required the admission of Roundy's testimony, federal habeas actions typically do not lie to review questions regarding the admissibility of evidence under state law. *Estelle v. McGuire,* 502 U.S. 62, 67-72 (1991) ("Nor do our habeas powers allow us to reverse McGuire's conviction based on a belief that the trial judge incorrectly interpreted the California Evidence Code in ruling that the prior injury evidence was admissible as bad acts evidence in this case"). Rather, federal habeas review of trial error is limited to whether the error constituted a violation of a specific constitutional right of the defendant, or "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. 637, 642 (1974); *Lewis v. Jeffers,* 497 U.S. 764, 780 (1990), *reh. den.* 497 U.S. 1050 (1990).

Petitioner contends that the state courts' rulings denied him the right to present evidence in support of his theory of the case, and thereby violated the holdings of *Chambers v. Mississippi,* 410 U.S. 284 (1973), *Washington v. Texas,* 388 U.S. 14 (1967) and *Rock v. Arkansas,* 483 U.S. 44 (1987). However, those cases stand for the proposition that a court may not arbitrarily exclude exculpatory evidence. *Rock,* 483 U.S. at 55 (Just as a state may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony); *Chambers,* 410 U.S. at 302 (In the exercise of the right to present testimony, the Defendant, as well as the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence).

In the instant case, the Idaho courts did not exclude the evidence arbitrarily, but pursuant to its established rules of evidence. There is no constitutional right for a criminal defendant to present inadmissible or irrelevant evidence, *Carriger v. Lewis,* 971 F.2d 329, 333 (9th Cir. 1992); *Perry v. Rushen,* 713 F.2d 1447, 1450 (9th Cir. 1983), *cert. den.,* 469 U.S. 838 (1984). Moreover, the United States Supreme Court has instructed federal courts in habeas actions that they are not "to engage in a finely tuned review of the wisdom of state evidentiary rules." *Marshall v. Lonberger,* 459 U.S. 422, 438, n. 6, (1983).

In summary, the Court cannot find that the exclusion of Roundy's testimony by the Idaho trial and appellate courts violated any specific constitutional right of the Petitioner. Nor can the Court find that those rulings "so

infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo,* 416 U.S. at 642; *Lewis v. Jeffers,* 497 U.S. at 764. Accordingly, the Court declines to grant habeas relief based upon the Petitioner's claim that Roundy's testimony was improperly excluded.

2. Admission of Statements By JoAnn Buccola

The second issue raised by Petitioner is that his rights under the Confrontation Clause were violated when the trial court admitted hearsay statements of Joann Buccola, the sister of victim Betty Gray. Specifically, Petitioner argues that the trial court erred when it admitted into evidence four statements under the residual exception to the hearsay rule: 1) That Petitioner told Betty Gray to keep the divorce a secret; 2) That Petitioner was angry with Betty Gray because he discovered she told her mother about the divorce; 3) That Petitioner was angry with Betty Gray because she had told Buccola about the divorce; and 4) That betty Gray believed Petitioner knew of her affair with Leavitt because she found a card she had received from Leavitt on the floor of the closet where she had hidden notes and letters from Leavitt. The trial court found that each of the statements contained circumstantial guarantees of trustworthiness so that they were admissible under I.R.E. 803(24).

However, the rule precluding the admission of hearsay testimony, with its many exceptions, is not coterminous with the rights protected by the Confrontation Clause. The Confrontation Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of

the Clause. *See Idaho v. Wright,* 497 U.S. 805, 813 (1990). As the Court has explained, "[w]hile a literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable, this Court has rejected that view as 'unintended and too extreme.'" *Bourjaily v. United States,* 483 U.S. 171, 182 (1987) (quoting *Ohio v. Roberts,* 448 U.S. 56, 63 (1980)). Although the Court has recognized that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it has been careful not to equate the Confrontation Clause's prohibitions with the general rule prohibiting the admission of hearsay statements. *See Idaho v. Wright,* 497 U.S. at 814. For this reason, the admission of an out-of-court statement may violate the Confrontation Clause, even though admissible under an exception to the hearsay rule. *See, e.g., Id.; California v. Green,* 399 U.S. 149, 155-156 (1970); *Bruton v. United States,* 391 U.S. 123 (1968).

In *Ohio v. Roberts,* 448 U.S. 56, 65 (1980) the Court set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause. If a witness is unavailable, his or her out-of-court statement "is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* Thus, the veracity of hearsay statements is sufficiently dependable to allow the untested admission of such statements against an accused when (1) "the evidence falls within a firmly rooted hearsay exception" or (2) it contains "particularized

guarantees of trustworthiness" such that adversarial testing would be expected to add little, if anything, to the statements' reliability. *Id.*, at 66.

However, not all common exceptions to the hearsay rule have been deemed by the Court to be "firmly rooted" in our jurisprudence. *See, e.g., Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 1899 (1999) (accomplices' confessions as statements against penal interest). Significantly, the Supreme court has held that "Idaho's residual hearsay exception, Idaho Rule Evid. 803(24) . . . is not a firmly rooted hearsay exception for Confrontation Clause purposes." *Idaho v. Wright,* 497 U.S. at 817. Therefore, the trial court's admission of Buccola's statements under Rule 803(24) violated the Petitioner's rights under the Confrontation Clause, unless those statements contain "particularized guarantees of trustworthiness." *Ohio v. Roberts,* 448 U.S. at 65.

Here, the trial court conducted a pretrial hearing and carefully considered the circumstances under which Ms. Gray's out-of-court statements were made. The trial court determined that the context in which each of the statements were [sic] made provided the necessary guarantees of trustworthiness. Specifically, with regard to the first statement – that Petitioner told Betty Gray to keep the divorce a secret – the trial court found that it was repeated to two individuals, was made spontaneously, and was made without a motive to fabricate. With regard to the second and third statements – that Petitioner was angry with Betty Gray because he discovered she told others about the divorce – the trial court found that Betty Gray had made the statement spontaneously, had repeated the statements to two other individuals and that she was nervous and apprehensive at the time she made the

statement. Finally, with regard to the fourth statement – that Betty Gray believed Petitioner knew of her affair with Leavitt – the trial court found that the statement was made spontaneously and without a motive to fabricate.

The trial court engaged in precisely the type of process which the Supreme Court in *Wright* suggested was necessary to protect the Defendant's rights under the Confrontation Clause.[4] For this reason, the Court cannot find that the trial court's findings as to trustworthiness resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. Nor can the Court find that the trial court's findings resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. *See* 28 U.S.C. § 2254(d). Therefore, Petitioner's application for writ of habeas corpus is denied as to this issue.

3. Photo Lineup

The Petitioner argues that he was denied his right to Due Process because the photo lineup procedure utilized during the investigation of the crime was so suggestive that it was conducive to irreparable mistaken identification. The only witness allowed to testify at trial concerning

[4] Moreover, the trial court considered relevant to its determination many of the same factors which the *Wright* decision suggests is relevant and appropriate to the determination of trustworthiness and reliability, including the spontaneity of the statement, the consistency of repetition, the mental state of the declarant and the lack of motive to fabricate. *Id.*, 497 U.S. at 819-20.

his sighting of Petitioner on the night at issue was a security guard at the Eastern Idaho Regional Medical Center named Steve Mackley. Mackley reported seeing a man ride a bicycle into the hospital parking lot and place it in a vehicle. Mackley approached the man and engaged him in conversation. The parking lot was dimly lit, but Mackley had a flashlight and skimmed it over the man's face several times during their conversation. The man spoke to Mackley over the top of his reading glasses, and Mackley asked the man for identification. In response, the man gave his name to Mackley and showed him a medical bracelet.

Mackley later gave police a description of a man who matches Petitioner's description, with one significant difference – although Mackley was uncertain whether the man he questioned in the Travelall that night had a mustache, he did not believe the man had a beard. It is undisputed Petitioner had a full beard on the night in question. Mackley was asked to look at a photo lineup three days after he had spoken to the man in the hospital parking lot, and he immediately identified the Petitioner. Mackley again identified Petitioner six days later when he happened to see the Petitioner at the hospital.

Petitioner contends that the photographic lineup was suggestive in that: 1) the witness who viewed the lineup knew one of the individuals in the lineup, thereby essentially leaving only a five-photo lineup; 2) his photo had a rose colored background while the other photographs were a white or green background; 3) he was the only individual wearing reading glasses, and the only one other individual wearing any kind of glasses was wearing sunglasses; and 4) Petitioner is the only individual in the photo lineup who is smiling.

An out-of-court identification must be suppressed if it was obtained as a result of procedures so unnecessarily suggestive that they are conducive to mistaken identification. *Neil v. Biggers,* 409 U.S. 188, 196 (1972); *Simmons v. United States,* 390 U.S. 377 (1968). The key to admissibility is the reliability of the identifications. Even if a photo lineup is suggestive, such suggestiveness may be overcome by the reliability of the identification. *Manson v. Brathwaite,* 432 U.S. 98, 106 (1977). The *Brathwaite* case sets forth five factors to review in determining whether an identification is reliable: 1) the opportunity of the witness to view the criminal at the time of the crime; 2) the witness's degree of attention; 3) the accuracy of his or her prior description of the criminal; 4) the level of certainty demonstrated at the identification; and 5) the length of time between the crime and the identification. *Id.* at 114.

In order to determine whether an out-of-court identification procedure is so impermissibly suggestive as to taint subsequent identification testimony in deprivation of the defendant's due process rights, the Court must examine the totality of the surrounding circumstances. *United States v. Nash,* 946 F.2d 679, 681 (9th Cir. 1991). If the procedure was impermissibly suggestive, then the Court must decide whether the identification testimony, including both the out-of-court identification and the subsequent in-court identification, is nonetheless sufficiently reliable to be admitted into evidence. *Id.*

This Court finds, as did the Court of Appeals, that the photo lineup was somewhat suggestive. The fact that Petitioner's photo is the only one with a pink tint does tend to draw some attention to that photo. Moreover, Mackley specifically remembered the individual he met in the hospital parking lot spoke to him looking over his

glasses, and the Petitioner was the only individual in the lineup wearing reading glasses.

However, even if a pretrial procedure is impermissibly suggestive, automatic exclusion of identification testimony is not required. *United States v. Duran-Orozco,* 192 F.3d 1277, 1282 (9th Cir. 1999); *United States v. Montgomery,* 150 F.3d 983, 993 (9th Cir. 1997), cert. denied, ___ U.S. ___ (1998). As indicated above, a suggestive lineup does not require exclusion of an identification if it is nevertheless reliable under the five factors set forth in *Brathwaite.* The first factor set forth in *Brathwaite* is the opportunity of the witness to view the criminal at the time of the crime. The record indicates that Mackley spoke to the man in a dimly lit parking lot, but that he skimmed the flashlight over the man's face several times during the conversation. Furthermore, although the man did not look directly at Mackley, but rather faced forward during the conversation, Mackley had a fairly extensive discussion with the man he later identified as the Petitioner. In fact, Mackley had time to ask him who he was, if he was feeling all right, where he was going, and who owned the Travelall vehicle. Therefore, the Court finds that Mackley had a reasonable opportunity to view the Petitioner on the night of the murders.

Next, the Court is to consider Mackley's degree of attention. Mackley was working as a security guard that night, and testified that he thought it

> seemed odd to be out at that time in the morning. Usually you don't see bicyclists out, you know, 2:30 in the morning. I don't know. I like to catch people. I've caught people before, and I just thought maybe he was doing something. Anybody

> around the hospital was suspicious to me at that time of night.

Trial Transcript, p. 2055. Additionally, Mackley had time to see that the man was red-faced, sweating, and had pock marks on his face. Therefore, the Court finds that Mackley paid careful attention to the physical features of the person he confronted in the parking lot.

The third *Brathwaite* factor to consider is the accuracy of Mackley's prior description of the Petitioner. It is undisputed that Mackley's description of the Petitioner was accurate – with the notable exception of the beard, which Mackley did not describe to the police. *See,* Memorandum in Support of Plaintiff's Motion for Summary Judgment, p. 43. The trial court characterized this description as "fairly accurate," a characterization with which this Court agrees. The description was close, with one significant physical feature being overlooked.

The next factor the Court is to consider is the level of certainty demonstrated at the identification. A review of Mackley's testimony indicates that he was confident that Petitioner's photograph was the man he had seen in the parking lot the night of the murders, but that he was very concerned about not noticing the beard. Nevertheless, it is clear that he firmly believed his identification was correct.

Finally, the Court will consider the length of time between the crime and the identification. Mackley identified the Petitioner from the photo lineup three days after he spoke to the man in the parking lot of the hospital. The Court of Appeals found that this span of time "does not detract from the reliability of the identification." *State v. Gray,* 129 Idaho at 797, 932 P.2d at 920. This Court agrees that three days is not such a lengthy span of time so as to

detract from the reliability of the identification. This is especially true in the instant case, where Mackley did not put the conversation out of his mind, learned of the murder the next morning, immediately believed there was some connection between the murder and the man in the parking lot, was subsequently questioned about the encounter by the police, and was asked to write down the details. Therefore, he would have been turning over the man's description in his mind in the days preceding the photo lineup.

The Court finds that Mackley's identification is sufficiently reliable to outweigh the slight suggestiveness of the photo lineup. The Court finds that Petitioner has not proven that the lineup was so suggestive so as to create a substantial likelihood of misidentification. Therefore, the Court finds that the identification was properly admitted at trial, and as such, does not provide grounds for habeas relief.

4. Polling of Jurors regarding Mid-Trial Publicity

The final issue Petitioner raises in his application is that he was denied his due process guarantee of an impartial jury when the trial court failed to poll all jurors regarding prejudicial mid-trial publicity. There were two occurrences of publicity during the trial. First, although a gag order had been issued by the trial court, one of the prosecution's witnesses, Clayton Roundy, son of Reeda Roundy, held a press conference on the courthouse steps after the conclusion of his testimony on the third day of trial. In his comments to the press, Roundy stated that he felt confident that the jury would convict the Petitioner, that there was enough circumstantial evidence to convict,

and that Petitioner was the one who actually pulled the trigger. A portion of the press conference was aired on the news by at least one local station.

The second incident occurred on the sixth day of trial. It involved a story which appeared on the front page of the local newspaper which compared the Petitioner's trial with that of death row inmate Paul Ezra Rhoades, and included side-by-side photographs of the two. The story compared the nature of the crimes, the suspects, the prosecutions and the courtroom attendance of the two trials. The defense moved for a mistrial on the grounds that the publicity was pervasive enough for the Court to presume prejudice. Alternatively, the defense requested that the trial court poll the jury to determine if any of them had been exposed to either the press conference or the newspaper article. The prosecution agreed that polling the jurors was appropriate.

The trial court concluded that there was no presumption of prejudice, but polled the jurors individually in chambers and on the record, but without counsel or the Petitioner present. The results of the poll yielded the fact that one juror had seen Roundy talking to the press, but had not heard the content of his comments, and another juror had seen the headline containing Petitioner's name, but had not read the article. The trial court concluded that the jurors had followed the court's admonition concerning avoidance of trial publicity, and denied the motion for mistrial.

It appears that the trial court inadvertently neglected to poll Juror Mark Bailey, who was a news reporter for twenty years. Petitioner correctly contends that because criminal cases require unanimous verdicts, Juror Bailey's

vote was just as important as any other. Therefore, Petitioner argues that because Bailey may have been exposed to the mid-trial publicity, yet was allowed to deliberate, this court should grant Petitioner's application for writ of habeas corpus.

On its face, this claim gives the Court pause. While the Court of Appeals noted that it was unlikely that the one juror who was not polled opted to violate the district court's repeated admonishments, it was still possible that he did so, and that his vote was influenced by the publicity. *Id.,* 129 Idaho at 802-03, 932 P.2d at 925-26.

When considering an issue of juror access to extrinsic evidence, the Ninth Circuit has held that a defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is "a reasonable possibility that the extrinsic material could have affected the verdict." *Dickson v. Sullivan,* 849 F.2d 403, 405 (9th Cir. 1988). It is the Petitioner's burden to prove that constitutional error occurred, *Simmons v. Blodgett,* 110 F.3d 39, 41 (9th Cir. 1997), and it is Respondent's burden to prove that the constitutional error is harmless beyond a reasonable doubt. *Dickson,* 849 F.2d at 405. The Court will first consider Clayton Roundy's comments to the press after his testimony. Roundy's comments could be considered prejudicial in nature, as he stated that he believed there was enough circumstantial evidence to convict, and that he personally believed that Petitioner was the one who pulled the trigger. The record indicates a portion of the press conference was aired on at least one local news station.

However, the trial court repeatedly admonished the jury to avoid all media accounts of the trial and the underlying crime. At least seven times prior to Roundy's press conference, which occurred on the third day of trial, the trial court had so admonished the jury. The Court presumes that the jury followed the instructions of the trial court, *United States v. Hanley,* 190 F.3d 1017, 1027-1028 (9th Cir. 1999); *Wade v. Calderon,* 29 F.3d 1312, 1320 (9th Cir. 1994), and the Petitioner has not provided this Court with any evidence, such as an affidavit from Juror Bailey, to indicate that he did not. Therefore, the Court finds that Petitioner has not met his burden of proving that constitutional error has occurred. The absence of such evidence, coupled with the fact that the trial judge repeatedly admonished the jury about the media, persuades this Court that the grounds for the trial court to declare a mistrial did not exist.

With regard to the newspaper article, the Court finds that it was not highly prejudicial in nature. There was minimal discussion of the evidence presented. The article merely compared the Rhoades trial with that of the Petitioner. The author was more interested in courtroom attendance and prosecutorial styles, than actual evidence presented. Moreover, Petitioner has not presented the Court with any evidence that Juror Bailey saw or read the article. For that reason, and for the reasons stated above with regard to the Roundy press conference, this Court finds that the trial judge properly denied the motion for mistrial, and there are no grounds for habeas relief on this issue.

Therefore, as the Court has found no grounds for the grant of a writ of habeas corpus on any of the four issues raised by Petitioner, the Court hereby grants Respondent's

Motion for Summary Judgment and denies Petitioner's Motion for Summary Judgment.

6. Order

Based on the foregoing and the Court being advised in the premises,

IT IS HEREBY ORDERED that Petitioner's Motion to Exceed the Page Limit for Memorandum in Support of Motion for Summary Judgment (Docket No. 19), filed August 9, 1999, shall be and is hereby GRANTED.

IT IS FURTHER ORDERED that Respondent's Motion for Summary Judgment (Docket No. 14), dated July 27, 1999, shall be and is hereby GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion for Summary Judgment (Docket No. 18), dated July 27, 1999, shall be and is hereby DENIED.

Dated this 31st day of March, 2000.

/s/ B. Lynn Winmill
B. LYNN WINMILL
Chief United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM L. GRAY, Petitioner-Appellant, v. JOSEPH KLAUSER, WARDEN, Respondent-Appellee.	No. 00-35732 D.C. No. CV-98-00387-BLW ORDER (Filed April 22, 2002)

Before: LAY*, TROTT and BERZON, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing. Judges Trott and Berzon have voted to deny the petition for rehearing en banc. Judge Lay recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

* The Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

932 P.2d 907

Court of Appeals of Idaho.

STATE of Idaho, Plaintiff-Respondent-Cross Appellant,
v.
William L. GRAY, Defendant-Appellant-Cross Respondent.

No. 21030.

Jan. 2, 1997.
Petition for Review Denied
March 19, 1997.

Weinpel, Woolf & Combo, Idaho Falls, and Grant & Newcomb, Laramie, WY, for appellant.

Alan G. Lance, Attorney General; Lynn E. Thomas, Deputy Attorney General, Boise, for respondent.

PERRY, Judge.

William L. Gray was found guilty by a jury of two counts of first degree murder, I.C. § 18-4003, and one count of first degree burglary, I.C. §§ 18-1401, -1403. On appeal, Gray alleges multiple errors by the district court and by his trial counsel and seeks reversal of his judgments of conviction. The state cross-appeals, claiming that the district court relied upon inappropriate factors in sentencing. We affirm.

I.

FACTS AND PROCEDURE

In the early morning hours of July 24, 1989, Gray's wife, Betty Gray, and her friend, Reeda Roundy, were killed in Roundy's house in Idaho Falls. In 1992 Gray was

indicted for two counts of first degree murder and one count of first degree burglary.

On May 11, 1993, Gray went to trial before a jury. The prosecution argued that Gray killed Betty because he was aware that she was having an affair. The prosecution further alleged that, to prevent his motive for her murder from being discovered, Gray had asked Betty not to discuss their impending divorce with their family and friends. The prosecution contended that Gray had purchased an International Travelall vehicle, which he registered in someone else's name, with the intent to avoid use of his usual vehicle and thereby conceal his presence at the scene of the crime. The prosecution attempted to prove that Gray drove the Travelall from the Grays' home in Jackson Hole, Wyoming, to the Eastern Idaho Regional Medical Center in Idaho Falls on an evening when Betty was staying overnight with Roundy. Gray allegedly then rode a bicycle approximately three and a half miles to Roundy's house. The prosecution's theory continued that Gray killed both women and set the scene in the house to appear as though the killings were committed as part of a satanic ritual. After the killings, Gray then rode the bicycle back to the hospital.

The defense alleged that Gray was unaware at the time of Betty's death that she was having an affair. Gray contended that he could not have ridden a bicycle for seven miles due to his poor health. He also asserted that one of three other men associated with the two victims was responsible for the murders.

Following trial, the jury returned a verdict of guilty on two counts of first degree murder and one count of first degree burglary, with each of the crimes being enhanced

for the use of a firearm. Gray was sentenced to two determinate life sentences for first degree murder and ten years, with a minimum period of incarceration of five years, for first degree burglary.

II.

ANALYSIS

A. Hearsay Statements

Gray filed a motion in limine seeking to exclude hearsay statements made by Betty regarding her husband, their marriage, their impending divorce and her affair. The district court granted Gray's motion in part and denied it in part.

The trial court has broad discretion in deciding whether to admit hearsay under one of the many exceptions to the general rule that hearsay is inadmissible. This Court will not overturn the exercise of that discretion absent a clear showing of abuse. *State v. Zimmerman,* 121 Idaho 971, 974, 829 P.2d 861, 864 (1992). *See also Dept. of Health and Welfare v. Altman,* 122 Idaho 1004, 1007, 842 P.2d 683, 686 (1992). When a trial court's discretionary decision in a criminal case is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason. *State v. Hedger,* 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). In order to mandate a reversal, it must be shown that the objectionable evidence contributed to the verdict and thereby

affected the substantial rights of the defendant. *State v. Cliff,* 116 Idaho 921, 924, 782 P.2d 44, 47 (Ct.App.1989).

1. Betty's statements

(a) I.R.E. 803(24) hearsay exception and Confrontation Clause

Among the statements reviewed by the district court prior to trial were three statements which the district court admitted pursuant to I.R.E. 803(24).[1] Gray contends on appeal that the district court erred in admitting these statements and that their admission violated his rights pursuant to the Confrontation Clause of the United States Constitution.

The first inquiry must be whether the statements were hearsay, that is, whether they were out-of-court statements offered as an assertion of proof of the matters asserted therein. *State v. Gomez,* 126 Idaho 700, 704, 889 P.2d 729, 733 (Ct.App.1994). *See also Isaacson v. Obendorf,* 99 Idaho 304, 309, 581 P.2d 350, 355 (1978). Hearsay is made generally inadmissible by I.R.E. 802. *Gomez,* 126 Idaho at 704, 889 P.2d at 733. However, if the statements were hearsay, the next inquiry is whether they were admissible under an exception to the hearsay rule.

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[1] Statement C – Betty told JoAnn Buccola, her sister, and Janis Roby that Gray wanted to keep the divorce a secret. Statement F – Betty told Buccola that Gray was angry with her: (1) after Gray steamed open a letter to her mother which discussed the divorce; and (2) for telling Buccola about the divorce. Statement G – Betty stated to Buccola that she believed Gray knew of her affair with LeRoy Leavitt because she found a card from Leavitt on the floor of her bedroom closet after she had previously hidden the card, with others, in the closet.

Idaho Rule of Evidence 803(24) creates an exception to the inadmissible hearsay rule for:

> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The district court examined statements identified as C, F and G and determined that they were being offered to prove the truth of the matters asserted therein and were, therefore, hearsay. The district court further determined that each statement was relevant to a material fact, was more probative than other evidence available to the prosecution, and its admission would promote the interests of justice. The district court reviewed each statement, found circumstantial guarantees of trustworthiness and, through the use of reason and application of the appropriate legal standards, deemed the evidence admissible. *See Hedger,* 115 Idaho at 600, 768 P.2d at 1333. The district court did not abuse its discretion in finding these statements admissible pursuant to I.R.E. 803(24).

Once a statement is determined to be hearsay, even if it is found to be admissible due to an exception to the hearsay rule, a criminal defendant's rights pursuant to the Confrontation Clause of the Sixth Amendment of the United States Constitution must be addressed. In *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597

(1980), the United States Supreme Court set forth an approach for determining when incriminating statements, admissible under an exception to the hearsay rule, also meet the requirements of the Confrontation Clause. A statement of a declarant, who will not be a witness at trial, is admissible only if the prosecution establishes that the declarant is unavailable and if the statement bears adequate indicia of reliability. If the statement falls within a firmly rooted hearsay exception, reliability can be inferred. If, however, the statement does not fit within a firmly rooted hearsay exception, the statement is presumed inadmissible, and that presumption can only be overcome by a showing of particularized guarantees of trustworthiness. *Roberts,* 448 U.S. at 66, 100 S.Ct. at 2539.

Idaho Rule of Evidence 803(24) has been specifically addressed by the United States Supreme Court in relation to the Confrontation Clause. In *Idaho v. Wright,* 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), the Supreme Court determined that I.R.E. 803(24) is not a well-rooted exception to the hearsay rule and that hearsay admitted pursuant to that section must be proven to have particularized guarantees of trustworthiness. The Supreme Court noted the spontaneity of the statement, the consistency of repetition, the mental state of the declarant and the lack of motive to fabricate as indicators of trustworthiness. *Wright,* 497 U.S. at 821-22, 110 S.Ct. at 3149-50. The Supreme Court further stated that these factors are not exclusive, and the courts have considerable leeway to consider other appropriate factors. *Id.* at 822, 110 S.Ct. at 3150. The trustworthiness must, however, be shown from the totality of the circumstances that surround the making of the statement. *Id.* at 819, 110 S.Ct. at 3148-49. The

existence of corroborating evidence may indicate that any error in the admission of a statement was harmless, but is not an appropriate consideration in finding a statement was trustworthy. *Id.* at 823, 110 S.Ct. at 3150-51; *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674 (1986).

In this case, the district court determined that the context in which the statements were made provided guarantees of trustworthiness sufficient to assuage concerns regarding reliability and prevented a violation of the Confrontation Clause. *See State v. Giles,* 115 Idaho 984, 987, 772 P.2d 191, 194 (1989). The district court found that statement C was made spontaneously, was repeated to two individuals and was made without a motive for fabrication. The district court further determined that when Betty made statement F she did so spontaneously; she repeated the statement to two individuals; and she was apprehensive and nervous at the time that she made the statement. Finally, the district court found that statement G was made without a motive for fabrication and was made spontaneously. Based on these findings, and the record regarding these statements, we affirm the district court's admission of statements C, F and G pursuant to I.R.E. 803(24).

(b) State of mind exception

In addition to the hearsay statements admitted under I.R.E. 803(24), the district court also admitted statements made by Betty prior to her death pursuant to I.R.E. 803(3). During a hearing on Gray's motion in limine, JoAnn Buccola, Betty's sister, testified that, prior to her death, Betty made certain statements to her which were

identified by the district court as statements B.[2] The district court deemed Betty's statement that she was having an affair with Leavitt a statement of fact, and therefore, not within the state of mind exception to the hearsay rule. The district court ruled that this statement was inadmissible. The remaining statements designated as B were deemed to fall within the I.R.E. 803(3) hearsay exception as expressions of the declarant's state of mind. The district court ruled, however, that they were only to be admitted if the defense first made them relevant by claiming that Betty and William Gray were happily married. Gray argues that the statements were admitted in error.

At trial, Gray's defense counsel inquired into the happiness of the Gray marriage while questioning the Grays' son, Jeff. Gray placed the happiness of his marriage at issue through cross-examination of a witness for the state. Betty's state of mind regarding her marriage thereby became relevant to Gray's defense against the charges. Gray argues, on appeal, that these statements did not bear "particularized guarantees of trustworthiness." However, the district court did not admit the statements under I.R.E. 803(24), which requires such a showing of trustworthiness. Instead, the district court admitted the statements under the firmly rooted hearsay exception I.R.E. 803(3). *See Terrovona v. Kincheloe,* 852 F.2d 424,

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[2] Statement B – Betty stated that she was having an affair with Leavitt. She further stated that she intended to divorce Gray, that she planned to marry Leavitt and that she intended to meet with Leavitt on the day that she was killed.

427 (9th Cir.1988). Hence, the district court's admission of statements reflecting Betty's state of mind was proper.

(c) Statements found inadmissible

In addition to the statements which the district court reviewed prior to trial and found admissible, the district court also reviewed statements H, I and J,[3] which were held to be inadmissible. Gray claims Buccola's statement, that the "doctors had told him that he should start doing mild exercises and walking," was admitted in violation of the district court's grant of the motion in limine as to statement I. However, the statement admitted at trial does not contain the elements of Gray's abuse of his kidney or his refusal to perform the exercises. Hence, the district court's order regarding statement I was not violated.

Gray did not object to the remaining testimony which he now claims was admitted in violation of the pretrial order. Statement J, which had been deemed inadmissible in the decision on Gray's motion in limine, came into evidence for the first time upon Gray's questioning of Buccola. During direct examination, Buccola mentioned that Gray "was looking at telephone bills and she did not want him to see my number on the phone bill," in violation

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[3] Statement H – Betty stated that Gray was looking over their telephone bills and checking the outgoing telephone numbers. Statement I – Betty said that she decided to divorce Gray because she had talked to his doctor; his doctor was upset because Gray was abusing a good kidney that he had received by transplant; and he was not doing mild walking exercises or riding an exercise bike as prescribed by the doctor. Statement J – Betty told Buccola that Gray was extremely angry and blamed Buccola for the impending divorce.

of the district court's order in limine on this issue. Gray elicited the same statement from Buccola during cross-examination.

The denial of a motion in limine generally preserves an issue for appeal. *State v. Babb,* 125 Idaho 934, 940, 877 P.2d 905, 911 (1994); *State v. Higgins,* 122 Idaho 590, 596, 836 P.2d 536, 542 (1992); *State v. Wood,* 126 Idaho 241, 243, 880 P.2d 771, 773 (Ct.App.1994); *Davidson v. Beco Corp.,* 112 Idaho 560, 564, 733 P.2d 781, 785 (Ct.App.1986), *rev'd on other grounds,* 114 Idaho 107, 753 P.2d 1253 (1987).[4] When the district court defers ruling on an evidentiary objection made in a motion in limine, the objection must be continued at trial. *State v. Hester,* 114 Idaho 688, 700, 760 P.2d 27, 39 (1988). Here, prior to trial, the district court granted the motion in limine as to statements H, I and J on the basis that the statements had not, at that time, been shown to be relevant. In such a situation we conclude that the litigant who has made a motion in limine requesting an advance ruling on the admissibility of evidence must continue to assert an objection as the evidence is offered or the objection is not preserved. *Hester,* 114 Idaho at 700, 760 P.2d at 39. Gray has failed to preserve his right to appeal the statements

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[4] The Idaho Supreme Court explicitly adopted the holding in *Davidson* that a denial of a motion in limine preserves the issue for appeal stating, "we continue to adhere to the holding in *Davidson v. Beco Corp., supra,* that if the motion *in limine* is made, and the trial court unqualifiedly rules on the admissibility or inadmissibility of the evidence prior to trial, no further objection at trial is required in order to preserve the issue for appeal." *State v. Hester,* 114 Idaho 688, 700, 760 P.2d 27, 39 (1988).

which were ruled inadmissible but were testified to without objection by Gray.

Even where a pretrial motion preserves an evidentiary objection for appeal, the defense may waive the objection during trial. *Davidson,* 112 Idaho at 564, 733 P.2d at 785. If the evidentiary challenge on appeal is not the same as that presented in the motion in limine and no objection during trial raised the specific basis, then that issue was not preserved for appeal. *Babb,* 125 Idaho at 940, 877 P.2d at 911; *Higgins,* 122 Idaho at 596, 836 P.2d at 542. Statements H and J were introduced through Gray's cross-examination of the witness. Agreeing to the admission of evidence which was previously deemed inadmissible is a waiver of the prior objection. *Davidson,* 112 Idaho at 564, 733 P.2d at 785. We conclude that eliciting the evidence similarly waives the prior objection. Statement I was not admitted at trial. Gray failed to preserve his appeal as to issues H and J and further waived his earlier objection by introducing the evidence in question. Gray has failed to establish a basis for relief on this issue.

2. Reeda Roundy's statements

Gray appeals from the district court's order excluding statements by Roundy that she was fearful of her ex-boyfriend, that he was a mercenary, that he followed her around and repeatedly telephoned her, and that he had threatened to kill her. The district court excluded these statements on the basis that they were hearsay not admissible within an exception to the hearsay rule.

As noted above, the first inquiry must be whether the statements were hearsay, that is, whether they were

out-of-court statements offered as an assertion of proof of the matters asserted therein. *Isaacson,* 99 Idaho at 309, 581 P.2d at 355. The statements were offered by the defense for the truth of the matters asserted to erode the prosecution's allegation that Gray killed Roundy and Betty. The statements consisted of factual assertions regarding Roundy's ex-boyfriend's occupation as a mercenary and his threats and repeated telephone calls. The statements also included Roundy's comments that she feared that her ex-boyfriend would harm her and that if anything happened to her, the police should be informed of her fears. The statements were offered to prove the truth of the matters asserted therein, hence they were hearsay. Gray contends that the statements, although hearsay, were admissible under I.R.E. 803(3) and (24).

The district court determined that Roundy's fear of a person not related to the prosecution was irrelevant. We review questions of relevancy de novo. *State v. Raudebaugh,* 124 Idaho 758, 764, 864 P.2d 596, 602 (1993). Relevant evidence is that which has

> [A]ny tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

I.R.E. 401; *State v. Hocker,* 115 Idaho 544, 547, 768 P.2d 807, 810 (Ct.App.1989).

A victim's fear of an individual is relevant in only limited-circumstances. *See* John W. Strong, McCORMICK ON EVIDENCE § 276, at 244 (4th ed. 1992). Purposes for which such statements are relevant include: establishment of a motive for the crime charged, *State v. Charboneau,* 116 Idaho 129, 143, 774 P.2d 299, 313 (1989); rebuttal of a

claim of self-defense, suicide, or accidental death by illustrating the victim's propensity for or away from the relevant tendencies, *United States v. Brown,* 490 F.2d 758, 767 (D.C.Cir.1973); or to dispel the argument that victim and the accused had a good relationship, *United States v. Tokars,* 95 F.3d 1520, 1535 (11th Cir.1996). In each instance, the state of mind of the victim was integral in understanding a significant issue in the case. Here, the individual whose state of mind was relevant to Gray's defense was not Roundy, but rather her ex-boyfriend. Roundy's statements that she feared her ex-boyfriend do not show that he possessed an intent to harm her. Therefore, the statements do not bear on a material issue at trial in the same manner as those statements of fear which have been found to be admissible as descriptions of an existing mental state. Roundy's fear of a third person does not establish or disprove Gray's guilt. Roundy's statements regarding her concern about her ex-boyfriend are inadmissible because they fail to meet the test for relevancy.

The statements regarding Roundy's ex-boyfriend's occupation and behavior do not fall within I.R.E. 803(3) because they do not describe a then-existing mental, emotional or physical condition. I.R.E. 803(3). The district court also considered I.R.E. 803(24) as an alternate theory of admissibility. As discussed earlier, I.R.E. 803(24) requires that the trustworthiness of the statement must be shown from the totality of the circumstances that surround the making of the statement. *Wright,* 497 U.S. at 819, 110 S.Ct. at 3148-49. In seeking the admission of the evidence at trial, Gray's counsel presented to the district court the content of the statements. Defense counsel did not provide an offer of proof which indicated the circumstances

surrounding Roundy's declarations. The witnesses who allegedly heard Roundy's statements were not called upon to provide a situational background for the statements. Hence, there is no record of the circumstances surrounding the statements. We cannot say that Roundy's factual statements regarding her ex-boyfriend's behavior and occupation bore the circumstantial guarantees of trustworthiness which would have justified admission under I.R.E. 803(24). The record does not support the assertion that the district court abused its discretion in excluding such evidence.

B. Excluded Evidence of Roundy's Involvement in the Occult

On the night of the murders, eighteen red candles were burned in a circle on Roundy's countertop, and a satanic message was written on Roundy's countertop in blood. Gray attempted to introduce evidence that Roundy practiced tarot card reading and astrology. He averred that a nexus existed between the practices of tarot, astrology and satanism. Gray argued that the evidence of Roundy's involvement in such practices was admissible to explain the candles and message. Gray asserted that the tie to satanism may have led the jury to believe that someone involved in satanic practices with Roundy had committed the murders. The state argued that the practices of tarot card reading and astrology are not linked to satanism and, as such, Roundy's pastimes were irrelevant. The district court excluded the evidence as irrelevant. Gray argues on appeal that the exclusion of this evidence was error.

As noted above, appellate review of a trial court's finding of relevancy is de novo. *Raudebaugh,* 124 Idaho at

764, 864 P.2d at 602. In this case, the district court determined:

> Because there is no evidence that tarot and astrology are more likely to be practiced by satanists than by persons who are not satanists, evidence that Roundy practiced tarot and astrology is irrelevant. Accordingly, such evidence is not admissible under Rule 401, I.R.E.

We find the district court's analysis in this regard persuasive. In answer to the state's motion for exclusion, no evidence was presented supporting the notion that a tarot card reader or reader of astrology is more likely than other individuals to be involved in satanic practices. Hence, we affirm the district court's exclusion of evidence regarding Roundy's participation in tarot card reading and astrology.

C. Photo Lineup

Prior to trial, Gray sought to suppress the eyewitness identifications by three witnesses for the prosecution. Patty Donbeck and Greg Black (a local police officer) reported seeing a man riding a bicycle between the murder scene and the Eastern Idaho Regional Medical Center in Idaho Falls on the night of the murders. Steve Mackley, a security guard for the hospital, was on duty that night and reported seeing a man ride a bicycle into the hospital parking lot and place it in a Travelall. The police showed these three individuals a photo lineup from which each chose Gray's photo as the man on the bicycle. Mackley later saw Gray at the hospital and again identified him, in person, as the individual from the parking lot on the night of the murders. The district court granted Gray's motion to

suppress the identification by Donbeck and denied the motion as to Black and Mackley. Officer Black testified at trial that he was unsure if Gray was the individual he saw that night. Mackley testified regarding his prior identifications and also made an in-court identification of Gray as the man he had seen in the parking lot. Therefore, Gray only challenges the district court's refusal to suppress the identifications by Mackley. Gray argues that the photo lineup shown to Mackley was impermissibly suggestive and conducive to irreparable mistaken identity and that admission of Mackley's identification of Gray's photo therefore violated Gray's rights to due process. He further argues that the later identifications were tainted by the suggestive photo lineup and were, therefore, also inadmissible.

In applying constitutional standards to the facts found, our review of a claim of due process violation is one of free review. *State v. Weber,* 116 Idaho 449, 452, 776 P.2d 458, 461 (1989); *State v. Bell,* 119 Idaho 1015, 1017, 812 P.2d 322, 324 (Ct.App.1991). An out-of-court identification must be suppressed if it was obtained as a result of procedures so unnecessarily suggestive that they are conducive to mistaken identification. *State v. Alger,* 115 Idaho 42, 44, 764 P.2d 119, 121 (Ct.App.1988). The due process test for suppression of an in-court identification that is allegedly tainted by an impermissibly suggestive out-of-court identification is whether the out-of-court identification was so suggestive that there is a very substantial likelihood of misidentification. *State v. Hoisington,* 104 Idaho 153, 161, 657 P.2d 17, 25 (1983). Hence, we will first review the out-of-court photo lineup identification. If the procedures surrounding Mackley's identification make it impermissibly suggestive, then admission of evidence

regarding that identification was error. Further, if that identification was so flawed as to taint the later identifications which Mackley made in person, then those later identifications should also have been suppressed.

The suggestiveness of a photo lineup is to be determined by applying a totality of the circumstances test. *Id.* at 162, 657 P.2d at 26; *State v. Haggard,* 119 Idaho 664, 666, 809 P.2d 525, 527 (Ct.App.1991). If the identification was the result of suggestive procedures, the reliability of the identification must be reviewed. Where the reliability of the identification is sufficient to outweigh the corrupting effect of the suggestive identification, the admission of the identification testimony or evidence will not violate due process. *Manson v. Brathwaite,* 432 U.S. 98, 106, 97 S.Ct. 2243, 2249, 53 L.Ed.2d 140 (1977); *Hoisington,* 104 Idaho at 162, 657 P.2d at 26. Reliability is the linchpin in determining the admissibility of in-court and out-of-court identifications. *Hoisington,* 104 Idaho at 161, 657 P.2d at 25. Factors to review in determining whether an identification is reliable include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his or her prior description of the criminal; (4) the level of certainty demonstrated at the identification; and (5) the length of time between the crime and the identification. *Id.*

A lineup may be considered unduly suggestive if a witness's attention is focused on the defendant. *State v. Hyde,* 127 Idaho 140, 146, 898 P.2d 71, 77 (Ct.App.1995). Single subject showups; multiple lineups, with the same individual recurring; and showing a witness a lineup in the presence of another witness increases the suggestiveness of the lineup. *See Hoisington,* 104 Idaho at 162, 657 P.2d at 26; *Hyde,* 127 Idaho at 146-47, 898 P.2d at 77-78.

The danger of misidentification is also increased when a photo is placed in a spread in such a manner that the witness's attention is drawn to it because of the size, color, placement, or other distinguishing mark. *Hyde,* 127 Idaho at 146, 898 P.2d at 77.

Gray contends that the photo lineup displayed to Mackley was flawed. Mackley knew the individual in photo six and was therefore shown, in essence, a five-photo lineup. Gray argues that because his picture bore a pink tint while the others carried a green or white tint, Mackley's attention was drawn to Gray's photo. He further argues that only he and one of the other four individuals unknown to Mackley wore glasses and that the other individual's glasses were sunglasses while his were reading glasses. Gray argues that this difference is important because in his statement to the police Mackley reported that the individual he saw in the hospital parking lot on the evening of the murders looked over his glasses while speaking to him. Gray further argues that he was the only individual in the photo lineup smiling.

The district court, in reviewing Gray's arguments regarding the lineup, determined that the lineup was not impermissibly suggestive. The district court found:

> In the present case, two of the men in the photographs appear to be the same age as Gray, and the rest appear to be no more than ten to fifteen years younger. All of the men in the photographs have receding hairlines, and four out of the six have facial hair. In addition, every person photographed appears to be the same race. Further, three of the persons pictured have grayish dark hair like Gray's. Therefore, even though Gray and the person in photograph six are the only

> ones who are wearing reading glasses and smiling, it cannot be said that the members of the photo lineup differ dramatically from one another.

The use of only five photos in a lineup is not necessarily suggestive. *Hyde,* 127 Idaho at 146, 898 P.2d at 77. Therefore a lineup of six photos, one of which contained a known individual, would not, alone, indicate that the lineup was suggestive. Similarly, difference in size and color composition of the photographs in and of themselves do not render an array unnecessarily suggestive. *Id.* Mackley reported seeing a man who looked over his glasses and was red in the face, and only Gray's photo showed a ruddy complexion and reading glasses. Gray's photo was also of a different color composition than the remaining pictures in the line-up. These three factors together, create an indicia of suggestiveness. Therefore, under the circumstances, we will review the reliability of Mackley's identification of Gray.

The first factor to consider in determining the reliability of Mackley's identification is his opportunity to view Gray. Mackley testified that the lighting in the parking lot was dim, that he had a flashlight but did not shine the light directly in the man's face and that the man never looked directly at Mackley during the conversation. However, Mackley also testified that he and the man held a conversation of some length. Their discussion included who the man was, whose vehicle it was and where the man was going.

The degree of the witness's attention is the second factor. Mackley was working as a security guard at the time he saw the man in the parking lot. He viewed the man as an intruder and a possible danger to the hospital

or cars parked there. Mackley, therefore, was an attentive observer. The third factor is the accuracy of Mackley's description. Mackley's description of the man he saw in the parking lot was, on a whole, accurate, but for the fact that Mackley did not report any facial hair. As the district court noted, in light of Mackley's failure to describe the man as one with facial hair, his description, as compared to Gray's appearance, was only fairly accurate. The fourth factor in determining the reliability of Mackley's identification is the level of certainty regarding the identification. Mackley was quite certain that the photograph of Gray was that of the man with whom he talked in the parking lot of the hospital. The fifth factor is the time span between the observation and the identification. Here, that time period was three days, which does not detract from the reliability of the identification.

Applying the five-factor test, Mackley's identification of Gray was sufficiently reliable to outweigh the low level of suggestiveness in the identification procedures. Therefore, its admission was not error and it did not taint the later identifications made by Mackley.

D. Lay Opinion Testimony

1. Admission of lay opinion

Gray contends that the district court erred in admitting the testimony of four lay witnesses regarding their opinion that Gray murdered Betty and Roundy. The state argues, first, that any error in this regard was not preserved on appeal by timely objection at trial. The state further argues that the opinions of the witnesses were not offered to prove Gray's guilt but, rather, were offered to

explain certain relevant actions by the witnesses themselves.

Gray acknowledges that his counsel did not object at trial to the statements which he now contends were admitted in error. As a general rule, in the absence of a timely objection to an alleged error at trial, the error will not be reviewed on appeal. *State v. Sharp,* 101 Idaho 498, 503, 616 P.2d 1034, 1039 (1980). A fundamental error may be reviewed on appeal even absent a timely objection. *State v. Lewis,* 126 Idaho 282, 284, 882 P.2d 449, 451 (Ct.App.1994). However, any error in admitting testimony is not fundamental error where the evidence does not go to the foundation of the case or take from the defendant a right which was essential to the defense. *State v. Higgins,* 122 Idaho 590, 596, 836 P.2d 536, 542 (1992); *Lewis,* 126 Idaho at 284, 882 P.2d at 451. We decline to decide whether the improper admission of lay opinion testimony may be fundamental error, reviewable on appeal in the absence of a proper objection. *See State v. Higgins,* 122 Idaho 590, 596, 836 P.2d 536, 542 (1992); *but cf. State v. Walters,* 120 Idaho 46, 813 P.2d 857 (1990). Because we have determined that there was no reversible error in this case, whether the matter is properly preserved for appeal need not be addressed.

Gray claims that the inadmissible opinion testimony was presented by four witnesses: Jeff Gray, Sara Hoffman, Detective Rodriguez and Kim Gray. Prior to testimony by any witness, defense counsel presented his opening statement. In the opening statement he alluded to a financial motivation for Gray's children to give damaging testimony:

> You'll hear a lot about the civil lawsuit. The civil lawsuit was a lawsuit in which the children

> sought to get the insurance proceeds on their mother's policies and other properties.
>
> There was a lawsuit for more than a half a million dollars. The money was on the table and you will hear a lot about that case.
>
> . . . .
>
> Finally in the fall of 1990, more than a year after these murders, Sara Hoffman decided to take matters in her own hands. She will testify that she was dissatisfied with the fact that her father has not been charged with these murders. She was prodded by her aunt, JoAnn Buccola.
>
> JoAnn never really cared for Bill, and so Sara sought the advice of legal counsel. On December 18th, 1990 she hired – or prior to that she hired [an attorney].
>
> . . . .
>
> The suit was initiated at a time when Sara Hoffman had her second child and was living in a trailer home. The suit was initiated at a time when Jeff was in school, had student loans, and was anticipating going into private practice upon his graduation. They sued when there was money on the table.

In answer to the defense's theory of the case, already clear from opening statements, the prosecution sought to identify Jeff Gray's motivation for testifying at trial. During direct examination of Jeff, the prosecution explained this line of questioning, which Gray now claims was error, saying, "It's been suggested in this courtroom maybe three hours ago, that you were only in it for the money because of your student loans," and "Your motives

have been discussed a little bit for filing the suit." Hence, evidence of Jeff's opinion was admissible as evidence of his motivation for testifying and credibility at trial.

During cross-examination, defense counsel asked Jeff about his financial situation, the insurance proceeds from his mother's death, the civil lawsuit and the lawsuit's eventual settlement. When Sara Hoffman, the Grays' daughter, took the witness stand, the children's motivation for testifying was even more at issue than during Jeff's direct testimony. Sara provided testimony similar to that of her brother regarding her rationale for testifying against her father. The above analysis applies to Sara's testimony as well, and, thus, her testimony was admissible.

In the direct examination of Kim Gray, the Grays' daughter-in-law, she testified that after she viewed Betty's body, Gray did not ask about its condition. Kim concluded that Gray had already seen the body. Gray contends that this testimony implies Kim's opinion that Gray was guilty. The testimony by Detective Rodriguez, which Gray now challenges on appeal, was elicited by defense counsel during cross-examination and indicated Rodriguez's belief that Gray was involved.[5]

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[5] Q: BY MR. MULLIGAN: . . . all investigation with regard to those two individuals stopped. Isn't that true?

A: Well, no, that's not true. Even though they were a group of suspects at that time, they were eliminated.

However, they have never – they proved where they were, their whereabouts. They had no motive. They didn't have the weapon.

(Continued on following page)

The jury properly heard the opinion evidence by Gray's children admitted for the purposes of showing their motivation for testifying and establishing credibility. We need not determine whether the testimony by Rodriguez and Kim was inadmissible. Any error in its admission was harmless in light of the other, admissible, evidence on the same point already before the jury. Hence, Gray is not entitled to relief on appeal pursuant to this claim.

2. Ineffective Assistance of Counsel

Gray argues that trial counsel's failure to object to the lay opinion testimony complained of above fell below the level of representation required by law and prejudiced him by contributing to his conviction. The state argues that even if the evidence was improperly admitted, the error does not merit relief on appeal.

Although it is well established that ineffective assistance of counsel claims are preferably brought through an application for post-conviction relief, if it is clear from the record that trial counsel was ineffective, the claim may properly be raised on direct appeal. *See State v. Allen,* 123 Idaho 880, 882, 853 P.2d 625, 627 (Ct.App.1993). In order to prove a claim of ineffective assistance of counsel, an appellant must show that the attorney's conduct fell below an objective standard of reasonableness. *Strickland v. Washington,* 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984); *Aragon v. State,* 114 Idaho 758,

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And so, therefore, the only suspect we have, proved by his own actions, included himself and involved himself a little more and more, day by day, was the defendant William Gray.

760, 760 P.2d 1174, 1176 (1988). There is a strong presumption that trial counsel's performance falls within the wide range of professional assistance. *Id.* An appellant must not only show incompetence, but must also show that the deficient conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Ivey v. State,* 123 Idaho 77, 80, 844 P.2d 706, 709 (1992). In order for the appellant to satisfy the second prong of the *Strickland* test, he or she must establish that there is a reasonable probability that the outcome of the trial would have been different but for counsel's unprofessional errors. *Aragon,* 114 Idaho at 761, 760 P.2d at 1177.

Gray argues that his trial counsel should have objected to inadmissible opinion testimony of four witnesses: Detective Rodriguez, Kim Gray, Jeff Gray and Sara Hoffman. Gray contends that these four witnesses testified regarding their opinion of his guilt and that his defense counsel was ineffective in failing to object to the testimony. Gray argues that the testimony in this case was inadmissible lay opinion testimony. *See* I.R.E. 701; *State v. Walters,* 120 Idaho 46, 54-57, 813 P.2d 857, 865-68 (1990).

As noted above, the testimony by Jeff Gray and Sara Hoffman was admissible. If a motion or objection lacked merit and would have been denied, counsel ordinarily would not be deficient for failing to pursue it and concomitantly, the defendant could not have been prejudiced by the want of pursuit. *See Huck v. State,* 124 Idaho 155, 158, 857 P.2d 634, 637 (Ct.App.1993). Counsel was not deficient in failing to object to admissible testimony.

The testimony by Detective Rodriguez was elicited by defense counsel during cross-examination. Hence, it was

not counsel's failure to object, but rather his active questioning of Rodriguez that led to the statement. Gray has failed to address the area of counsel's conduct which led to the admission of this testimony. Further, the question asked by defense counsel addressed when the investigation focused on Gray. Rodriguez chose to explain the sequence of events and reasons more fully than counsel may have anticipated or desired. However, asking the question was not deficient performance and therefore does not fall outside the wide range of professional conduct.

Gray claims that his counsel was ineffective in failing to object to Kim Gray's testimony. The prosecution discussed Kim's viewing and identification of Betty's body and asked Kim whether people had approached her afterward to inquire about the condition of the body. The prosecution then asked Kim who had not done so, to which Kim responded that "actually, I found it very peculiar that [Gray] did not ask me what I had seen until I realized that he knew what I saw." The statement was not responsive to the question and defense counsel had no notice that Kim would make such a statement. Trial counsel "may well have made the tactical decision not to object and move to strike, so as not to draw further attention to the passing reference." *State v. Roles,* 122 Idaho 138, 147, 832, P.2d 311, 320 (Ct.App.1992). We will not second guess defense counsel's decision not to object to the statement after it had been placed before the jury in this situation.

Further, in light of the testimony by Gray's children, review of the record indicates that Rodriguez and Kim Gray's testimony did not prejudice the defense and Gray has therefore not established the second prong of *Strickland.* The record on appeal does not establish that absent this testimony the outcome of the trial would have been

different. Gray has failed to establish his claim for ineffective assistance of counsel.

E. Change of Venue

A trial court's decision on a motion to change venue is discretionary in nature. *State v. Hall,* 111 Idaho 827, 829, 727 P.2d 1255, 1257 (Ct.App.1986). Error cannot be predicated on the mere existence of pretrial publicity concerning a criminal case. The validity of a court's decision to try a case in a particular venue is tested by whether, in a totality of existing circumstances, juror exposure to pretrial publicity resulted in a trial that was not fundamentally fair. *State v. Hyde,* 127 Idaho 140, 145, 898 P.2d 71, 76 (Ct.App.1995). Factors to consider in determining whether the defendant has received a fair trial, and thus whether denying the motion for change of venue was an abuse of discretion, include: an affidavit indicating a prejudice in the community; testimony at voir dire as to whether any juror had formed an opinion of the defendant's guilt; whether the defendant challenged for cause any of the jurors finally selected; the nature and content of the pretrial publicity; the length of time elapsed between the pretrial publicity and the trial; and any assurance given by the jurors themselves concerning their impartiality. *State v. Jones,* 125 Idaho 477, 484, 873 P.2d 122, 129 (1994); *State v. Needs,* 99 Idaho 883, 890, 591 P.2d 130, 137 (1979).

In this case there was pretrial publicity. However, the jury was chosen without significant difficulty. The district court questioned the potential jurors at length during voir dire regarding the effect of pretrial publicity. All jurors eventually selected to hear the case testified during voir

dire that they had not formed an opinion regarding Gray's guilt. Gray did not challenge for cause any of the jurors who sat on the case. There were almost four years between the date of the crime and the beginning of the trial. In light of the totality of the circumstances, the jury's exposure did not lead to fundamental unfairness at trial. Based upon the forgoing, we hold that the district court did not abuse its discretion in denying the motion for a change of venue.

F. Jury

1. Failure to strike juror for cause

Gray contends that the district court should have struck prospective juror Burton from the jury panel for cause. Burton indicated on a jury questionnaire that she had formed an opinion regarding Gray's guilt as a result of the information she received from the media. Gray contends that because the district court refused to remove Burton from the jury panel he was forced to use a peremptory challenge.

Gray acknowledges that *Ross v. Oklahoma,* 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988) holds that the Sixth Amendment guarantee of a fair and impartial jury is not violated when a defendant is forced to peremptorily challenge a juror whom the court erred in refusing to dismiss for cause, "so long as the jury that sits is impartial." Gray continues, "on the present facts, Appellant has suffered no violation of his federal Sixth Amendment right to an impartial jury in the absence of a showing that the final jury was not impartial, and he makes no such claim here." Gray seeks a more protective rule from this Court based upon the Idaho Constitution.

Having formed or expressed an unqualified opinion or belief that the defendant is guilty, or not guilty, of the offense charged indicates an implied bias and is thereby a basis for challenging a juror for cause. I.C. § 19-2020. A challenge for cause is to be decided upon by the trial court. I.C. §§ 19-2024; -2027. That decision is discretionary in nature. *State v. Grube,* 126 Idaho 377, 385, 883 P.2d 1069, 1077 (1994), *cert. denied,* 514 U.S. 1098, 115 S.Ct. 1828, 131 L.Ed.2d 749 (1995); *State v. Hedger,* 115 Idaho 598, 600-01, 768 P.2d 1331, 1333-34 (1989). Burton's comment on the questionnaire was an expression of an opinion or belief that Gray was guilty. However, in answer to questions during voir dire Burton specifically indicated that she felt able to set aside her prior beliefs and feelings if chosen as a juror.

The district court listened to and evaluated the juror's responses during voir dire and denied the challenge. *See Grube,* 126 Idaho at 385, 883 P.2d at 1077. Passing juror Burton for cause was not error. We, therefore, need not address whether an error in this regard merits relief, pursuant to the Idaho Constitution, absent a showing that the impaneled jury failed to be impartial.

2. Sequestration

Gray contends that the district court erred in failing to sequester the jury. A trial court's decision to sequester the jury is reviewed for abuse of discretion. *State v. Hall,* 111 Idaho 827, 831, 727 P.2d 1255, 1259 (Ct.App.1986).

The district court issued a gag order prohibiting all involved in the trial from discussing it with the press. The district court also repeatedly admonished the jury not to review any press reports relating to the trial. Further the

district court polled the jury regarding publicity viewed during the trial proceedings. In light of the district court's strict admonitions and cautionary measures, the district court did not abuse its discretion in refusing to sequester the jury. *Id.*

3. Failure to poll all jurors regarding mid-trial publicity

Gray moved for a mistrial on the basis that mid-trial media coverage had occurred which may have prejudiced the jury. Gray argued that a television interview was given by Roundy's son, Clayton, after he testified, despite a gag order imposed by the district court. Further, Gray complained of an article which compared Gray with convicted murderer Paul Ezra Rhoades which was published in a local paper. The newspaper article consisted, primarily, of a contrast between Gray's trial and the earlier trial of Rhoades. The article discussed the differences in the crimes, prosecutions, courtroom attendance and the suspects. The district court did not grant the requested mistrial but questioned the jury members, on the record outside the presence of the attorneys and Gray, regarding the mid-trial publicity. Based on these interviews the court concluded that none of the jurors had observed the press reports and therefore no jury bias had arisen. Gray argues that juror number one was inadvertently not questioned and, thus, Gray's constitutional rights to a fair trial and due process were violated.

The decision to grant or deny a motion for mistrial is a discretionary one for the trial court. *State v. Atkinson,* 124 Idaho 816, 818, 864 P.2d 654, 656 (Ct.App.1993), *cert. denied* 511 U.S. 1076, 114 S.Ct. 1659, 128 L.Ed.2d 376 (1994). On appeal, however, we do not review whether the

trial court reasonably exercised discretion under the circumstances, but rather, whether the event upon which the motion is based constitutes reversible error. *Id., citing State v. Urquhart,* 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct.App.1983). We will not disturb the district court's denial of a motion for a mistrial unless the event which precipitated the motion for a mistrial constitutes reversible error, when viewed in the context of the full record. *State v. Brazzell,* 118 Idaho 431, 436, 797 P.2d 139, 144 (Ct.App.1990). A mistrial is required if the misconduct of the jury prejudiced the defendant to the extent that he or she did not receive a fair trial. *United States v. Berry,* 627 F.2d 193, 197 (9th Cir.1980). Hence, we review whether, in light of the fact that eleven of the twelve jurors and both alternates were questioned regarding publicity, the failure to question one witness denied Gray a fair trial.

The district court determined:

> The first issue as to whether the publicity has been so pervasive as to give rise to a presumption of prejudice in this case, I find no basis for that, and I'll deny the motion on that basis.

The district court went on to poll the jury in the interests of fairness. During that polling, thirteen of the fourteen members of jury, including the alternates, testified that they had avoided the publicity which led to Gray's motion. The district court then found that there was no actual prejudice as the jurors had not seen the media coverage of which Gray complained.

The trial court has broad discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Marshall v. United States,* 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959);

United States v. Noah, 475 F.2d 688 (9th Cir.1973). Each case must turn on its special facts. *Marshall,* 360 U.S. at 312, 79 S.Ct. at 1172-73; *Noah,* 475 F.2d at 692. A trial court should conduct a voir dire if serious questions of possible prejudice arise. *United States v. Williams,* 809 F.2d 1072, 1091-92 (5th Cir.1987). To determine if such questions exist the court must first look at the [sic] whether the news material was innately prejudicial in light of factors such as timing and possible effects on legal defenses. *Id.* The court must also ascertain the likelihood that the publicity has in fact reached the jury by reviewing the prominence of the media coverage and the nature and number of warnings against viewing the coverage. *Id.*

As noted above, the newspaper article was not of a highly prejudicial nature. The discussion of the evidence against Gray was minimal. The article focused, instead, on the relatively low public interest and attendance at Gray's trial. The television interview with Clayton Roundy was recorded shortly after he testified. In that interview, Clayton Roundy indicated that, after viewing the evidence presented at that point, he believed Gray would be convicted and that Gray was the one who actually had committed the murders.

The district court had admonished the jury regarding the media at least seven times prior to the release of the newspaper article and television news story. It is presumed that the jury follows the instructions of the trial court. *See State v. Boothe,* 103 Idaho 187, 192, 646 P.2d 429, 434 (Ct.App.1982). The district court repeatedly explained that the jurors should avoid all media reports regarding the trial or underlying crime. Hence, although the television story, and to a lesser degree the newspaper story, were potentially prejudicial, it is unlikely that the

one juror who was not polled opted to violate the district court's repeated admonishments.

Further, the district court took immediate action to discover the extent to which the jury had been prejudiced. Although the record reflects that one juror was inadvertently bypassed in the district court's questioning, the remaining thirteen all had conformed to the district court's numerous instructions to avoid the media coverage of the trial. Gray did not present any evidence, such as a post-trial affidavit of the juror who was not questioned, to support the proposition that the juror had read the article or seen the television report. The frequent warnings by the district court were clearly effective in preventing the jurors polled from viewing media reports of the trial.

This Court agrees with the district court's determination that the newspaper article and television report in this case did not deny Gray a fair trial. As noted, this is particularly true in light of the district court's frequent admonishments which were complied with by the thirteen jurors polled. Hence, it was not an abuse of the district court's discretion to deny the motion for mistrial after its investigatory voir dire of all but one member of the jury.

G. Sufficiency of the Evidence

Gray complains that the evidence at trial was insufficient. The standard of review for a challenge to a judgment of conviction based upon the sufficiency of the evidence was stated by this Court as follows:

> Appellate review of the sufficiency of the evidence is limited in scope. A judgment of conviction, entered upon a jury verdict, will not be set aside where there is substantial evidence upon

> which any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Filson,* 101 Idaho 381, 386, 613 P.2d 938, 943 (1980). "[W]e are precluded from substituting our judgment for that of the jury as to the credibility of witnesses, the weight of the testimony, and the reasonable inferences to be drawn from the evidence." *State v. Campbell,* 104 Idaho 705, 718-19, 662 P.2d 1149, 1162-63 (Ct.App.1983). Furthermore, we view the evidence in the light most favorable to the respondent. *State v. Fenley,* 103 Idaho 199, 203, 646 P.2d 441, 445 (Ct.App.1982).

State v. Decker, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct.App.1985). *See also State v. Robran,* 119 Idaho 285, 288, 805 P.2d 491, 494 (Ct.App.1991).

Gray premises his argument, in part, on statements made during sentencing wherein the district court expressed lingering doubts about Gray's guilt. We note that the district court was provided three opportunities to grant Gray's motion for a judgment of acquittal. I.C.R. 29. In denying the third of Gray's motions, the district court concluded:

> I have given this case a great deal of thought, and it has been a troubling case to me. But, when I apply the rules, as I have just summarized, and conceding that this Court cannot substitute its judgment for that of the jury, it is my view that there was substantial competent evidence to support the convictions found by the jury in this case.
>
> Had this Court been on the jury, I would have perhaps evaluated the evidence differently than

> other members of the jury. I may have determined the credibility of witnesses differently than the jury did and afforded different weight to the evidence than did the jury in this case and may have drawn different inferences from the evidence, but I can't substitute my judgment for the jury.

We agree with district court in its analysis of this issue. Although this Court may have reached a different conclusion, we are not free to substitute our view for that of the jury. There was substantial, although conflicting, evidence in the record supporting Gray's convictions for first degree murder and first degree burglary.

H. Cumulative Error Doctrine

Gray contends that even if no individual error assigned above is sufficient to merit reversal of his conviction, when compounded together, they merit reversal under the cumulative error doctrine. The cumulative error doctrine "refers to an accumulation of irregularities, each of which by itself might be harmless, but when aggregated, the errors show the absence of a fair trial, in contravention of the defendant's constitutional right to due process." *State v. Peite,* 122 Idaho 809, 822, 839 P.2d 1223, 1236 (Ct.App.1992). Although there were irregularities around Gray's trial, they do not singularly or in combination amount to a denial of due process of law.

I. Delay in the Appeal Process

Gray claims that delay in processing his appeal denied him due process of law. No showing of prejudice can be made to support an assignment of error involving a delay

in processing an appeal if the appeal lacks merit. *United States v. Tucker,* 8 F.3d 673, 676 (9th Cir.1993); *State v. Gallipeau,* 128 Idaho 1, 3-4, 909 P.2d 619, 621-22 (Ct.App.1994). Hence, Gray's contention in this regard is also meritless.

J. Cross-Appeal

The state filed a cross-appeal, alleging that the district court erred in sentencing Gray. Specifically, the state contends that the district court erred in relying upon "lingering doubt" of Gray's guilt as a mitigating factor in sentencing. Idaho Code Section 19-2515(c) provides that the death penalty shall not be imposed unless a statutorily identified aggravating factor exists. That statute further provides that, even if an aggravating factor exists, the death penalty is not appropriate if mitigating factors exist which outweigh the aggravating factor.

Where the trial court erred in imposing sentence, the case may be remanded for resentencing, even if the error was to the defendant's advantage. *See State v. Lankford,* 127 Idaho 608, 617, 903 P.2d 1305, 1314 (1995), *cert. denied,* 517 U.S. 1128, 116 S.Ct. 1370, 134 L.Ed.2d 535 (1996). However, once a life sentence has been imposed double jeopardy bars the imposition of the death penalty. *Lankford,* 127 Idaho at 618 n. 5, 903 P.2d at 1315 n. 5; *Caudill,* 109 Idaho at 229, 706 P.2d at 463. Resentencing, in such situations, will entail only a choice between a fixed or indeterminate prison term. *Lankford,* 127 Idaho at 618 n. 5, 903 P.2d at 1315 n. 5. Accordingly, even if the state prevailed on its cross-appeal, we would be constrained not to vacate the sentence in this case and remand it for further action because the sentence imposed, a determinate life

term, is the maximum which could be imposed upon remand. Because we conclude that resentencing Gray to the death penalty would violate the double jeopardy clause in this case, we will not vacate the sentence already imposed even if the trial court erroneously considered an inappropriate mitigating factor. *Caudill,* 109 Idaho at 229, 706 P.2d at 463. Accordingly, we will not address the cross-appeal issue further.

III.

CONCLUSION

Certain irregularities existed in Gray's trial. However, they did not singularly or in combination result in the denial of due process. Accordingly we uphold the judgments of conviction. We note that the trial court used lingering doubts of Gray's guilt as a factor in sentencing. Regardless of whether utilizing such a consideration is error, we will not remand for resentencing because of double jeopardy concerns. Hence, the judgments of conviction and sentences are affirmed.

WALTERS, C.J., concurs.

LANSING, J., concurs, except as to section II(A)(1)(c), in which she concurs in the result only.